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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1902~~ 1903.

No. ~~420~~ 150

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK AND THE RAPID TRANSIT UNDERGROUND RAILROAD COMPANY, APPELLANTS.

vs.

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, INDIVIDUALLY AND AS MAYOR OF THE CITY OF NEW YORK; BIRD S. COLER, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 28, 1902.

(18,717.)

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1 The President of the United States of America to Robert A. Van Wyck, individually and as mayor of the city of New York; Bird S. Coler, individually and as comptroller of the city of New York; Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith, Morris K. Jesup, individually and as members of the pretended board of rapid-transit commissioners of the city of New York; John B. McDonald, the Rapid Transit Subway Construction Company, and the City of New York, Greeting:

You are hereby commanded that you and each of you personally appear before the judges of the circuit court of the United States of America, for the southern district of New York, in the second circuit, in equity, on the first Monday of August, A. D. 1901, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by the Underground Railroad of the City of New York and the Rapid Transit Underground Railroad Company, and do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, on the 9th day of July, in the year of our Lord one thousand nine hundred and one and of the Independence of the United States of America, the one hundred and twenty-sixth.

JOHN A. SHIELDS, *Clerk.*

JAMES M. FISK,
Solicitor for Complainants.

2 The defendants are required to enter appearance in the above cause, in the clerk's office of this court, on or before the first Monday of August, 1901, or the bill will be taken *pro confesso* against them.

J. A. S., *Clerk.*

I hereby certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named Robert A. Van Wyck, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named Robert A. Van Wyck, as mayor of the city of New York, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named Bird S. Coler, individually, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named Bird S. Coler, as comptroller of the city of New York, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

3 I hereby further certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named Woodbury Langdon, individually, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named Woodbury Langdon, as a member of the pretended board of rapid-transit commissioners of the city of New York, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity, upon the within-named George L. Rives, individually, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna upon the within-named George L. Rives, as a member of the pretended board of rapid-transit commissioners of the city of New York, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named John B. McDonald,

4 by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 9th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named Rapid Transit Subway Construction Company, by exhibiting to Frederick Evan, as secretary of said company, the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 10th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named John H. Starin, individually, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 10th day of July, 1901, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named John H. Starin, as a member of the pretended board of rapid-transit commissioners of the city of New York, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify that on the 10th day of July, 1901, at the

city of New York, in my district, I personally served the within subpœna in equity upon the within-named Albert E. Orr, whose right name is Alexander E. Orr, individually, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 10th day of July, 1901, at the city of New York, in my district, I personally served the
5 within subpœna in equity, upon the within-named Albert E. Orr, whose right name is Alexander E. Orr, as a member of the pretended board of rapid-transit commissioners of the city of New York, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I am unable to find the within-named Charles L. Smith and Morris K. Jesup.

WILLIAM HENKEL,
U. S. Marshal, S. D. of N. Y.

New York, July 10th, 1901.

(Endorsed:) Circuit court of the United States, for the southern district of New York.—The Underground Railroad of the City of New York, *et al. vs.* Robert A. Van Wyck, individually, and as mayor of the city of New York and others.—Subpœna.—U. S. circuit court, Filed Jul- 10, 1901, John A. Shields, clerk.

6 *Bill in Equity.*

Circuit Court of the United States, Southern District of New York.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

The Underground Railroad of the City of New York, and the Rapid Transit Underground Railroad Company each of which is a domestic corporation duly organized and existing under the laws of the State of New York, with its principal office and place of residence in the city and county of New York, and a citizen and resident of the city, county and State of New York, and a tax-payer in the city, county and State of New York, presents this their bill of complaint against the City of New York, which is a domestic and a public corporation duly organized and existing under laws of the State of New York and a citizen of the State of New York, Robert A. Van Wyck individually and as mayor of the city of New York, who is a resident of the city, county and State of New York, Bird S. Coler individually and as comptroller of the city of New York who is a citizen and resident of the city and State of New York, Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith, Morris K. Jessup individually, and as members of the pretended board of rapid-transit commissioners of the city of
New York each of whom is a citizen and resident of the city,
7 county and State of New York, John B. McDonald, who is a citizen and resident of the city, county and State of New

York, and the Rapid Transit Subway Construction Company, which is a domestic corporation organized and existing under the laws of the State of New York with its principal office and place of business in the city, county and State of New York and which is a citizen and resident of the city, county and State of New York.

And thereupon your orators complain and say:

I. The names, the residences and citizenship of the parties to this suit are correctly stated in the introduction to this bill; and the same are hereby incorporated by reference into this paragraph of this bill with the same effect as if the same were separated and set forth here specifically and at length. On March 26th, 1881, the Central Tunnel Railway Company, a domestic corporation, was duly organized under and in pursuance of the so-called general railroad and tunnel law of the State of New York, namely, chapter 140 of the Laws of 1850 and the various acts amendatory of and supplemental to the same and chapter 582 of the Laws of 1880. In pursuance of said statute, articles of association were duly executed and filed and recorded in the office of the secretary of state of New York on March 26, 1881. Subsequently thereto on or about November 12, 1881, said articles were duly amended by the board of directors of said Central Tunnel Railway Company.

A copy of said articles of association as amended was on or about December 7, 1881, duly executed and filed and recorded in the office of the secretary of state of New York. A copy thereof as amended is annexed to this bill and marked Exhibit A.

Each and every statement in the said articles of incorporation is true. Compliance and obedience were duly made by said corporation and its incorporators, members, officers and stockholders with all the requirements of the statutes of the State of New York
8 with respect to the incorporation of railroad companies and tunnel companies. Stock in said corporation to the extent of two thousand ($2,000) dollars for every mile of railroad proposed to be made was duly subscribed for and more than fifty per cent. thereof was actually paid in cash to said corporation by the subscribers of said stock before said articles of association were filed as aforesaid.

On or about March 28, 1882, a map and profile of the route intended to be adopted and adopted by said corporation was duly signed and certified by the president and engineer of said corporation, and by a majority of the board of directors of said corporation, and filed in the office of the register of the county of New York.

Written notice of the time and place where said map and profile were filed, and that the route designated thereon passed over the lands of such occupants, was duly given by said corporation on or before June 20, 1882, to all the occupants of the land over which the route of said railroad and tunnel was so designated.

The route and line of said corporation were duly surveyed, costly plans, estimates and specifications for its construction were made and more than $100,000 were expended by said corporation in surveying, preparing plans and specifications and preparing for the construction of the railroad and tunnel described in its said articles of association and maps.

II. Section 1 of chap. 582 of the New York Laws of 1880 is as follows: "Whenever according to the route and plans adopted by any "railroad company heretofore or hereafter formed under any special "act of the legislature of this State, or under chapter one hundred "and forty of the laws of eighteen hundred and fifty, entitled 'An "act to authorize the formation of railroad corporations and to "regulate the same,' and all acts supplementary thereto or amenda-"tory thereof for the building of its railroad, it shall be necessary
"or proper to build said road, or any part of the same under
9 "ground, or to tunnel or bridge any river or waters, it shall
"be lawful for said company to enter upon and acquire title "to and use such lands under water and uplands, except on or "along any canals owned by the State, as shall be necessary for pur-"poses herein mentioned, and they shall have the power to con-"struct, erect and secure the necessary foundations and other struct-"ures which may be required for the operating of such road or "connecting the same with another and for maintaining the same, "and purchase or acquire, in the manner now provided by law, "such lands or rights or easements in land along their said route "upon, over or beneath the surface thereof, as may be necessary for "the building of their said road and making such connections; "provided, however, that where said road runs underneath the "ground at such depth as to enable said company to tunnel the "same, such tunnel shall be so built and at all times kept in such "condition as to make the surface of the ground above the same "and in the neighborhood thereof firm and safe for buildings and "other erections thereon, and, in case surface excavations are made, "as soon as can be done the surface shall be restored to its former "condition, except so far as may be actually required for ventilation "of the tunnel beneath the same or access thereto; and provided, "further, that whenever such road, or any part of the same, is "intended to be built within the limits of any city or incorporated "village of this State and to run by means of a tunnel underneath "any of the streets, roads or public places thereof, the said com-"pany, before building the same underneath any of said streets, "roads or public places, shall obtain the consent of the own-"ers of one-half in value of the property bounded on the line, and "the consent of the board of trustees of the village by resolution "adopted at a regular meeting and entered on the records of "said board, and of the proper authorities having control of said
"streets, roads or public places; or in case such consent of the
10 "owners of property bounded on the line cannot be obtained,
"the general term of the supreme court in the district in "which such city or village is situated may, upon application, "appoint three commissioners who shall determine, after a hear-"ing of all parties interested, whether such railroad ought to be "allowed to be built underneath said street-, roads and public "places, or any of them, and in what manner the same may be so "built with the least damage to the surface, and to the use of the "surface to the public, and the determination by said commissioners, "confirmed by the court, may be taken in lieu of the consent of said

"authorities and property-owners. And provided, further, that when "any railroad company constructs, under this act, its railroad under "any part or within the limits of any city or incorporated village "of this State, subject to the provisions and limitations of this act it "shall be lawful for any railroad company to connect its road there- "with at such points or places as such company may elect, and all "railroad companies constructing their road or roads under the pro- "visions of this act shall be subject to all the provisions of an act "entitled 'An act to authorize the formation of railroad companies, "and to regulate the same,' passed April second, eighteen hundred "and fifty, and all acts supplementary thereto and amendatory "thereof; and further at such point or points, place or places, where "such connections shall be made by connecting roads, the railroad "companies owning such roads shall build, at their joint expense "and for their joint use, such passenger and freight depots, and "other accommodations for handling passengers and freight as may "be required for the convenience of the public."

Section 2 of the same chapter 582 of the Laws of 1880 is as follows: "Any such railroad company, the greater part of whose road- "bed according to its said route and plan is to be below the "surface of the ground, and whose road does not exceed "three miles in length, may at any time after its said route "shall have been adopted, and the map thereof shall have been filed "as required by law, merge and consolidate its capital stock, fran- "chises and property with the capital stock, franchise and property "of any other railroad company organized under the laws of this "or any other State, in the manner now provided by law for the "consolidation of railroad companies, whenever the railroads of said "companies so to be consolidated may together form a continuous "line of railroad, provided such consolidation shall not prevent all "connecting railroads from having equal rights of transit for their "passengers and freight through the tunnel upon the same equita- "ble terms."

III. On account of the prejudice then existing among the inhabitants and property-owners of the city of New York against the construction of street railroads and especially against the construction of underground railroads in the city of New York, the consent of the owners of property bounded on the line of the proposed railroad of the said Central Tunnel Railroad Company, could not then be obtained; although an attempt to procure such consents *were* duly made by said corporation prior to the application hereinafter described. For that reason, after such an attempt had been made and such consent could not be obtained, the said Central Tunnel Railway Company duly applied to the general term of the supreme court of the State of New York, for the first department, for the appointment of three commissioners to determine, after a hearing of all parties interested, whether such railroad ought to be allowed to be built under the streets, roads and public places of the city of New York specified in the said articles of association of said Central Tunnel Railway Company and to determine in what manner the said railroad might be built with the least dam-

age to the surface and to the use of the surface by the public. On February 2nd, 1883, an order was duly made,
12 on said application by said court. A copy of said order is hereto annexed marked Exhibit B. The said order granted the application and appointed the Honorable William G. Choate, the Honorable John T. Agnew and the Honorable James McLean commissioners for said purpose, with full power in said commissioners to grant to said corporation authority to construct said tunnel to the same extent as if the local authority and the abutting property-owners had consented to such construction. Messrs. William G. Choate and James McLean immediately duly accepted said appointment, duly qualified and entered upon the discharge of their duties. Proceedings under the said order are still pending before them undetermined for the following reasons. Mr. John T. Agnew declined to accept the said appointment and refused to qualify and refused to act as said commissioner. A vacancy in said commission was thereby made which deprived said commission of power to act until said vacancy was filled. The said corporation then duly applied to said general term for the appointment of a commissioner to fill the vacancy in said commission caused by the *removal* of said John T. Agnew to serve as such commissioner. The said general term thereupon duly appointed the Honorable William R. Grace as such commissioner to fill such vacancy. The said William R. Grace, however, declined said appointment and refused to qualify and refused to serve as such commissioner. Thereupon the said Central Tunnel Railway Company duly applied to the said general term for the appointment of a third commissioner to fill the said vacancy in said commission; and at the same time the said corporation duly offered to deposit in any place which the said court might designate the sum of five thousand ($5,000) dollars as security for the payment of the expenses of said commission. Said application was duly granted by said court. An order providing for filling said vacancy which proposed order left the name of the new commissioner
13 in blank to be supplied by the court, was duly drafted by the attorney for said corporation and immediately submitted by him to said general term. The said general term of the supreme court for the first department has not yet; and its successor the appellate division of the supreme court for the first department, has not yet entered said order and neither of said courts has filled said vacancy; and neither of said courts has yet designated nor appointed said third commissioner.

The rights of corporations similarly situated to said corporation in such a case under the laws of the State of New York *is* and *has* been said to be as follows:

"As to the first question (is the company precluded by laches "from calling the undetermined application for a third commis- "sioner to the attention of the court) there can be no question but "that there has been great delay in this matter. The important "question is has the delay been caused by the tunnel Co. Upon "the refusal of Mr. Grace to act, the tunnel company made an ap- "plication to the court for the appointment of a commissioner in his

"place. The application was heard, the papers filed and decision "reserved. The company had then done all that it was called upon "to do, the matter then passed to the court for its consideration and "any delay in the handing down of a decision was the delay not of "the petitioner, but of the court. No rule of law requires a peti- "tioner, to remind the court that it has not rendered a decision. It "is the duty of the court to determine matters properly presented to "it and litigants are warranted in presuming that the courts will "duly render their decisions. If the court delays in the perform- "ance of its duty, it would be a harsh rule of law which would "attribute the laches of the court, if it may be so called, to the liti- "gant."

In consequence of said inaction of the said general term and of its said successor proceedings before said commissioners
14 have been necessarily suspended; and the said Central Tunnel Railway Company has not and its successor your orator, The Underground Railroad of the City of New York has not, been able to continue the proceedings before said commissioners; and neither of said corporations has been able to commence the construction of its line of railroad. Said delay has been due to no fault, neglect nor omission of the said Central Tunnel Underground Railway Company and to no fault, neglect nor omission of your orator; but solely to the inaction and delay of the said court and to the acts of the defendants hereinafter set forth.

IV. Your orator is advised by its counsel learned in the law and your orator claims, insists and alleges; that by the aforesaid proceedings the said Central Tunnel Railway Company has acquired a vested and exclusive right and an exclusive franchise and an exclusive easement for the construction of a tunnel and an underground railroad over the route specified in the said articles of incorporation of the said Central Tunnel Railway Company.

In Rochester, H. & L. R. R. Co. *v.* N. Y., L. E. & W. R. Co., 44 Hun. 206, 210; the general term of the supreme court said, speaking through Barker:

"Under the general railroad act where a corporation has been "organized in compliance with the conditions of the statute and has "made a map and profile of the route intended to be adopted by "the company duly certified and filed as required by the twenty- "second section, it has acquired a vested and exclusive right to "build, construct and operate a railroad on the line which it has "adopted."

The decision and opinion were affirmed and approved by the New York court of appeals.

In Rochester, H. & L. R. R. Co. *v.* The N. Y. L. E. & W. R. R. Co. 110 N. Y. 128, 132–134 where that court said, speaking through Judge Gray:

"We think the general term were right in the view they took of the matter.

15 "The plaintiff, by its organization under the general rail- "road act of 1850, became possessed of the franchise to con- "struct and operate a railroad between the terminal points named

"in its articles, over such a line of route as it should elect. When "the initial steps, pointed out in the twenty-second section of the act "had been taken, there only remained for the plaintiff to acquire "through purchase, or through proceedings *in invitum*, the right of "way over the lands through which the line of route had been sur- "veyed. By the terms of that section every company formed under "the act, before constructing any part of its road through any "county, must make and file a map and profile of the route in- "tended to be adopted and must give a written notice to all occu- "pants of the land affected, of the time and place of filing and that "the route designated passes over the land of such occupants.

"Clearly there is involved in these provisions the intention of the "legislature that, after the initial proceedings have been taken, "which the statute points out as the first action of the new corpora- "tion, the lands over which the company's route is located shall be "subjected to the right of the company thereafter to construct "thereon. The legislative scheme contemplates the determination "of the line of route to be in the discretion of the company, to be "exercised in the mode prescribed by law and its exercise, when in "good faith and within the limits of its corporate powers, is only "reviewable by the court in the case of an application by an occu- "pant or owner of lands feeling aggrieved by the proposed location "of the road. This right to locate its line of road, at its election, is "delegated to the corporation by the sovereign power; as is the "right subsequently to acquire, *in invitum*, the right of way from "the land-owner and any land needed for the operation of its road.

"In this sovereign power is the source of the franchise, which
16 "the corporation possesses to construct and operate a railroad,
"and its grant is for public and not for private purposes.
"Public considerations enter into the grant of the franchise and "public policy favors the enterprise for the public convenience and "use. When therefore, a corporation has made and filed a map and "survey of the line of the route it intends to adopt for the construc- "tion of its road, and has given the required notice to all persons "affected by such construction, and no change of route is made, as "the result of any proceeding instituted by any land-owner or occu- "pant, in our judgment, it has acquired the right to construct and "operate a railroad upon such line; exclusive in that respect as to "all other railroad corporations and free from the interference of "any party. By its proceedings it has impressed upon the lands a "lien in favor of its right to construct, which ripens into title through "purchase or condemnation proceedings. We could not hold other- "wise without introducing confusion in the execution of such cor- "porate projects and without violating the obvious intention of the "legislature.

"The plaintiff's franchises were invaded and its enjoyment of "the statutory privileges disturbed by the action of the defendant "company, in so building tracks upon plaintiff's line of route as to "obstruct and interfere with its proposed construction. The remedy "by injunction was clearly available to the plaintiff on principles "of equity jurisprudence."

That such a right is a contract right and a right of property which *are* protected by the Constitution of the United States, is held by the same courts of the State of New York in O'Brien *vs.* Mayor &c., of N. Y., 111, N. Y. 1. Coney Island etc. R. R. Co. *v.* Kennedy; 15 App. Div. 588; Roddy *v.* Brooklyn City & N. R. R. Co., 32 App. Div. 311: and other cases.

V. On or about January 2, 1883, the New York and New Jersey Tunnel Railway Company was duly organized and incor-
17 porated under and in pursuance of chapter 140 of the New York Laws of 1850 and chapter 582 of the New York Laws of 1880 and the various acts amendatory of said statutes and supplementary to the same; and at or about said date, articles of association of the said New York and New Jersey Tunnel Railway Company were duly filed and recorded in the office of the secretary of the State of New York.

The line and route of said last-named corporation formed a continuous and a connected line with the line and route of the Central Tunnel Railway Company and with the line and route of the Terminal Underground Railway Company and the lines and routes of the said three corporations formed a continuous and a connected line.

On or about March 25th, 1886, the Terminal Underground Railway Company was duly organized and incorporated under and in pursuance of chapter 140 of the New York Laws of 1850 and chapter 582 of the Laws of New York of 1880 and the various acts amendatory to said statutes and supplementary to the same; and at or about said date articles of association of the said Terminal Underground Railway Company were duly filed and recorded in the office of the secretary of state of New York, a copy of which articles is hereto annexed and marked Exhibit D.

On or about August 21, 1896, the said Central Tunnel Railway Company and the said New York and New Jersey Tunnel Railroad Company and the said Terminal Underground Railroad Company were duly merged and consolidated under and in pursuance of the said chapter 582 of the Laws of 1880 and chapter 565 of the New York Laws of 1890 and article III of chapter 39 of the General Laws of the State of New York and the various acts amendatory of and supplementary to said statutes, especially under and in pursuance of chaptar 676 of the New York Laws of 1892 which was approved May 18th, 1892; and a joint agreement under the corporate seal of the three constituent corporations for the consolidation of said
18 three constituent corporations was duly entered into by the directors of the said three corporations. Said agreement prescribed the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation which was the Underground Railroad of the City of New York, the number and names of the directors and officers of such new corporation, who should be the first directors and officers thereof with their places of residence, the number of shares of the capital stock of such new corporation, the amount and par value of each share, and the manner of converting the capital stock of each of the said three constituent

corporations into that of the new consolidated corporation; how and when the directors and officers of such new corporations should be chosen and such other details as were necessary to perfect such new organization and the consolidation of said three constituent corporations. The stockholders of two-thirds of all the stock of each of such three corporations by a consent in writing, duly acknowledged as are deeds entitled to be recorded and endorsed upon said agreement of consolidation, duly signified their consent to the same. The said agreement of consolidation with said consents duly acknowledged as aforesaid was duly filed and recorded in the office of the secretary of State of New York at the city of Albany in the State of New York on October 2, 1896; and a duly certified copy and a duplicate original of said agreement and consents similarly duly executed and acknowledged by the said stockholders and directors was duly filed in the office of the clerk of the county of New York on October 6th, 1896. Thereupon, the said three constituent corporations were and became duly merged and consolidated in your orator The Underground Railroad of the City of New York, which thereupon came into existence and became incorporated and vested with all the privileges, property, rights, and franchises of the said three constituent corporations and became duly vested with the
19 rights and franchises of the said Central Tunnel Railway Company to construct an underground railroad and tunnel upon the route specified in the articles of association of said Central Tunnel Railway Company and to continue such proceedings as were necessary to perfect and to enforce said franchise.

At the time when said agreement and articles of consolidation and of incorporation were filed in the office of the secretary of State of New York as aforesaid a tax of one-eighth of one per centum of the capital stock of said Underground Railroad of the City of New York was duly paid by and on behalf of said corporation and its incorporators in pursuance of chapter 908 of the New York Laws of 1896 to the treasurer of the State of New York.

The articles of consolidation and incorporation of said Underground Railroad of the City of New York describe the route of said corporation as follows:

"4th. The length of said railroad, as nearly as may be estimated, "is not more than five miles, and the same is intended to be con- "structed from a point at or near the City Hall park, in said city of "New York, and running then northerly to and under Chambers "street, and through the block to and under Reade street to Elm "street, thence northerly through and under Elm, to and under "Spring street and Marion or Mulberry Sts., thence northerly "through the blocks and under the cross-streets to and under Great "Jones street, thence northerly through and under Astor place and "Eighth St., thence northerly and through the block to and under "Ninth street to Fourth Av. thence northerly through and under "Fourth avenue, to and under Forty-second street, to or near the "Grand Central depot, connecting with the Fourth Avenue Improve- "ment, with three connecting branches, the one forming a junction "with the main line at or near Thirty-third street, and run-

"ning in an easterly direction to the East river at or near Thirty-
"fourth Street ferry. The second forming a junction with
20 "the main line at or near the City Hall park, and running
"in an easterly direction to or near the East river, and thence
"southerly parallel with said river, and terminating at or near South
"ferry in said city of New York with stations at all the ferries on
"said line. The third commencing and forming a junction with
"the main line at or near City Hall park, and running thence west-
"erly under the streets and through the blocks to West street, and
"thence southerly parallel with West street, and terminating at
"or near South ferry in said city of New York, with stations at all
"the ferries on said line."

Subsequently thereto and on or about June 10, 1897, a map and profile of the said route and the remaining routes of said Underground Railroad of the City of New York was duly signed and certified by the president, the engineer and a majority of the directors of said corporation and duly filed in the office of the register of the city of New York.

VI. On April 9th, 1897, your orator, The Rapid Transit Underground Railroad Company, and a domestic corporation, was duly organized under and in pursuance of chapter 39 of the General Laws of the State of New York and the several acts amendatory thereof and supplemental thereto. In pursuance of said statute a certificate and articles of association and of incorporation of said corporation were executed, acknowledged and filed on said date in the office of the secretary of the State of New York, on April 9th, 1897, a duplicate original and a certified copy of said certificate and articles was duly filed in the office of the clerk of the county of New York. Said certificate stated the name of said corporation; the number of years it was to continue, namely ninety-nine (99) years, the kind of road to be built and operated; its length and termini; the name of the county in which it was to be located, the county of New York; the amount of its
capital stock which was one hundred thousand ($100,000)
21 dollars; the number of shares into which said capital stock
was to be divided, namely one thousand (1,000) shares; the names and post-office addresses of its directors who were not less than nine in number, who should manage its affairs for the first year; the place where its principal office was to be located; the names and post-office addresses of each of the subscribers to said certificate, who were fifteen in number, and the number of shares of stock in said corporation which each such subscriber agreed to take. Annexed to said certificate and taken as a part thereof was duly filed as aforesaid an affidavit of three of such directors of such corporation, which stated that ten per centum of the minimum amount of stock authorized by law had been actually in good faith subscribed thereto and paid in cash to the directors named in such certificate; and that it was intended in good faith to build, maintain and operate the road mentioned therein. Each statement in said affidavit and each statement in said certificate was and is true.

The length and termini of said railroad were stated in said certificate as follows:

"3rd. The kind of a road to be built or operated is that known "as a depressed or underground or tunnel railroad, or partly tunnel "and partly through an open cut, or both, except that portion of "the road located on Eleventh avenue, between 124th street and "134th street, and to extend and run underneath the ground, along "certain streets and through the blocks situated in the city and "county of New York, in the State of New York, as more particu-"larly described in paragraph number four thereof.

"4th. The length of said railroad, as nearly as may be esti-"mated, is ten miles, and the same is intended to be constructed "from a point at or near the Post-office building City Hall park, in "said city of New York, and running thence northerly under Park
" row and Centre street, and through the block to, and under
22 "Reade street, to near Elm street, thence northerly through
"and under Elm and under the cross-streets to, and under "Spring street and Marion or Mulberry streets, thence northerly "through the blocks and under the cross-streets to, and under Great "Jones street; thence northerly through and under Lafayette place "to, and under, Astor place and Eighth street, thence northerly and "through the block to, and under Ninth street to Fourth avenue, "thence northerly through and under Fourth avenue and under the "cross-streets to, and under, Forty-second street, to or near the Grand "Central depot, thence westerly through and under Forty-second "street, and the cross-streets to Broadway, thence northerly through "and under Broadway, and under the cross-streets to, and under, "59th street, thence northerly through and under the Boulevard "and Eleventh avenue, and under the cross-streets to 124th street, "thence northerly over and along the line of Eleventh avenue and "over the cross-streets to 134th street, thence northerly through and "under Eleventh avenue and under the cross-streets to, or near 155th "street."

On April 10th, 1897, your said orator duly paid to the treasurer of the State of New York the sum of one hundred twenty-five dollars ($125), which sum was one-eighth of one per centum upon the capital stock of your said orator. Said payment was made by said corporation and accepted by said treasurer as full payment of the tax and consideration for the privilege of the organization of your said orator and for the construction and operation of a railroad upon the route specified in its said certificate of incorporation and for the privilege of exercising all its franchises, in pursuance of chapter 908 of the Laws of the State of New York approved in the year 1896 and the other laws of the State of New York; and thereby and thereupon the State of New York entered into a contract with your orator
whereby the said State granted to your said orator the exclusive
23 right and franchise to construct and operate a railroad upon
the said route, saving the rights and privileges of the Underground Railroad of the City of New York. The said receipt was duly filed on April 10th, 1897, in the office of the secretary of state of New York and a duplicate original of said receipt was duly filed

in the office of the clerk of the county of New York on or about April 13th, 1897. Your orator The Rapid Transit Underground Railroad Company thereafter and up to the present time has duly continued its corporate existence; discharged all the obligations imposed upon it by the laws of the State of New York; paid taxes duly assessed against it by the city, county and State of New York; and your said orator is a tax-payer of the city, county and State of New York.

Thereafter and on or about October 11, 1897, your orator The Rapid Transit Underground Railway Company, made a map and profile of the route adopted by it in the county of New York namely the route specified in its said certificate of incorporation. Said map and profile was duly certified by the president and engineer of said corporation and by a majority of the directors of said corporation and filed in the office of the register of the city and county of New York. A duplicate original of said map and profile similarly certified was on the same date filed in the office of the clerk of the county of New York. Written notice of the time and place when and where such maps and profiles were filed and that such route passed over the land of the occupants of the same was duly given by said corporation to all actual occupants of the land over which the route of said railroad was so designated.

Subsequently thereto and on or about April 29th, 1897, your orator The Underground Railroad of the City of New York duly contracted for a valuable consideration with your orator The Rapid Transit Underground Railroad Company for the use of the
24 road and routes of the former by the latter corporation during the term of the corporate existence of the latter corporation; and said former corporation duly leased to said latter corporation the roads and routes and the rights and franchises of the former corporation for said term of years. Said contract further provided for a consideration in cash which was duly paid by the latter to the former corporation and for the exchange of the stock of the former corporation for stock in the latter corporation; which exchange was duly made. Said contract was duly ratified by the votes of all the directors and all the stockholders of both said corporations at meetings duly called for said purpose.

VII. On January 31st, 1891, a bill was signed by the governor of the State of New York, which purports to be a statute of said State and usually designated as the "Rapid-transit act of 1891." Said bill is hereinafter described as the rapid-transit act. Said bill is printed in the session laws of said State and is therein designated as chapter 4 of the Laws of 1891. Subsequently thereto, on May 22d, 1894, the governor of said State signed a bill designated as chapter 752 of the Laws of 1894 which purported to amend said "Rapid-transit act." The said bill signed in 1894 purported to amend section I of the said bill of 1892 so that the same should read as follows: "In each city having over one million of inhabitants, ac-
"cording to the last preceding national or State census, there shall
"be a board of rapid-transit railroad commissioners in and for such
"city, which shall consist of the mayor of such city, the comptroller

"or other chief financial officer of such city, the president of the "chamber of commerce of the State of N. Y., by virtue of his office, "and the following-named persons, to wit: William Steinway, Seth "Low, John Claflin, Alexander E. Orr and John H. Starin. The "members of said board shall be styled commissioners of rapid "transit. Vacancies which may take place in the offices so
25 "held by the persons specifically named herein as such com- "missioners shall be filled by a majority vote of the remain- "ing members of said board. The board thus constituted shall "have and exercise the specific authority and powers hereinafter "conferred also such other and necessary powers as may be requisite "to the efficient performance of the duties imposed upon said board "by this act."

Said bill, designated as chapter 752 of the Laws of 1894, provided that the said board of rapid-transit railway commissioners should cause the question, whether such railway or railways as were described in said two bills should be constructed by the city and at public expense, to be submitted to the vote of the qualified electors of the city within which such railway or railways were to be constructed; and certain formalities and conditions precedent to said election were therein prescribed. Said bill, in section 13 thereof, further provided that in case the majority of votes cast at such an election should be in favor of such municipal construction of said railway or railways, it should be the duty of said board within thirty days after the official declaration of the said vote to proceed to construct the said railway or railways. The said bill further provided that in case the majority of votes cast — power to grant the right to lay down railroad tracks to such person as they might elect and to grant to him the right to maintain and operate said tracks for a term of years not less than thirty-five nor more than fifty years. That the said railroad tracks might be constructed in underground subways or tunnels. That in case of such a popular election as was described in said bill the city of New York should advance the funds to construct such railroad tracks subways and tunnels. That for that purpose and for the purpose of paying the expenses of said commissioners and all legal expenses connected with said rapid-transit commission and said construction the city of New York should borrow money and issue bonds for the payment of the same

26 The so-called rapid-transit act and the bills purporting to amend the same further provide:

That the said rapid-transit commissioners should determine a route and general plan of construction for a rapid-transit railway or railways in the city in which it was appointed. In § 5 that a copy of the plans and conclusions adopted by that commission should be transmitted to the common council of the city where said rapid-transit railway was projected. That such common council should thereupon consider said plans and conclusions and vote upon a resolution to approve the same and consent to the construction of a railway or railways in accordance therewith. That upon the adoption of such a resolution by a majority vote of the members of

such common council and its approval by the mayor of the city "the said plans and conclusions shall be deemed to have been finally consented to and adopted, and such consents shall be deemed to be the consent of the local authorities of such city." That in case the consents could not be obtained of the property-owners along the line of the route or routes to the construction of a railway or railways upon which the approval of the local authorities had been thus given the said board should apply to the general term of the supreme court in the judicial district in which said railway was to be constructed for the appointment of "three commissioners to determine and report after due hearing whether such railway ought to be constructed and operated." That upon proof of due publication of notice of such application as prescribed in said rapid-transit act the said general term should appoint three commissioners for said purpose. That "the said commissioners shall determine after public hearing of all parties interested whether such railroad ought to be constructed and operated and shall report the evidence taken to said general term together with a report of their determination whether such road ought to be constructed and operated, which re-
27 port, if in favor of the construction and operation of such road, shall when confirmed by said court, be taken in lieu of the consent of the property-owners above mentioned." In § 6 that, after the consents of the local authorities and the authorization of the said general term had been obtained, said board should prepare detailed plans and specifications for the construction of a railway or railways in accordance with the general plan of construction previously adopted. That in case the people should determine by vote as provided in said rapid-transit act that any such railway or railways should be constructed for and at expense of such city after obtaining the consent of the local authorities of said city and of said general term in § 34 as set forth in bills designated as chapter 752 of the Laws of 1894 and chapter 529 of the Laws of 1895, that "as soon as such consents, where necessary, shall have been obtained, and the detailed plans and specifications have been prepared as provided in section six of this act, the said board, for and in behalf of said city, shall enter into a contract with any person, firm or corporation, which in the opinion of said board shall be best qualified to fulfil and carry out said contract, for the construction of such road or roads, upon the routes and in accordance with the plans and specifications so adopted, for such sum or sums of money, to be raised and paid out of the treasury of said city, as hereinafter provided, and on such terms and conditions, not inconsistent with the aforesaid plans and specifications, as said board shall determine to be best for the public interests. And said board may contract for the construction of the whole road, or all the roads provided for by the aforesaid plans in a single contract, or may by separate contracts, executed from time to time, provide for the construction of parts of said road or roads, or for the construction at first of two or more tracks over a part or parts of such road or roads, and afterwards of one or more additional tracks over a part or parts of such road or roads,
28 as the necessities of said city and the increase of its population may in the judgment of said board require. * * *

"Such contract shall also provide that the person, firm or corporation so contracting to construct said road or roads, shall, at his or its own cost and expense, equip, maintain and operate said road or roads for a term of years to be specified in said contract, not less than thirty-five nor more than fifty years, and upon such terms and conditions as to the rate of fare to be charged and the character of service to be furnished and otherwise as said board shall deem to be best suited to the public interest, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said board, provided, that in case the contract shall provide for construction at different times or at intervals of time of different parts of a road, or if the contract shall provide for the use of the contractor of an existing railroad as a part of a continuous route as aforesaid, then and in such case the board of rapid-transit railroad commissioners may in its discretion prescribe periods for the operation of the different parts of said road so that at one period of time in the future the board may be enabled to make a single operating contract or lease of the entire road. Such contract shall further provide by proper stipulations and covenants on the part of the said city, that the said city shall secure and assure to the contractor, so long as the contractor shall perform the stipulations of the contract, the right to construct and to operate the road as prescribed in the contract, free of all right, claim, or other interference, whether by injunction, suit for damages, or otherwise, on the part of any owner, abutting owner or other person. Such contract shall further provide that the person, firm or corporation so contracting to construct, maintain and operate said road shall annually pay into the treasury of said city, as rental for the use of said road, a sum which shall not, except as hereinafter provided,
29 be less than the annual interests upon the bonds to be issued by said city for the construction of said road as hereinafter provided for, and in addition to said interest, a further sum which shall be equal to a percentage of not less than one per centum upon the whole amount of said bonds, provided, that in estimating such annual interest and additional percentage there shall be deducted from the amount of said bonds the amount thereof issued to pay for rights, terms, easements, privilege or property other than lands acquired in fee. Such rental and the term for the operation of said road shall begin as to said road or any section thereof when the same shall be declared by the board of rapid-transit railroad commissioners to be completed and ready for operation. Said contract may also provide for a renewal or renewals of the lease of said road upon the expiration of the original term and of any renewals of the same upon such terms and conditions as to said board may seem just and proper, and may also contain provisions for the valuation of the whole or a part of the property of said contracting person, firm or corporation, employed in and about the equipment, maintenance and operation of said road, and for the purpose of the same by the city, at such valuation, or a percentage of the same, should said lease not be so renewed at any time. Said contract may provide for the construction of said road

in sections, and except as herein otherwise provided, shall specify when the construction of said road, or sections of the same shall be commenced, and in each case the date of completion. It shall also state the date on which the operation of the road, or of any section thereof, shall commence. The person, firm or corporation so contracting for the construction, equipment, maintenance and operation of said road, shall give a bond to said city, in such amount as said board of rapid-transit railroad commissioners shall require, and with sureties to be approved by said board, who shall justify in the aggregate in double the amount of said bond."

30 The said rapid-transit act purported to give the said board unlimited authority to select the contractor to whom the right to construct and to operate said railroad was granted by said rapid-transit board as aforesaid; and purported to authorize all of the members of said board to receive compensation from the funds of the city of New York, which has been done by them.

VIII. The said rapid-transit act as originally approved in 1891 and as subsequently amended makes no provision for the payment to your orators, and makes no provision for the payment to the said Central Tunnel Railway Company, and makes no provision for the payment to any one for any franchise which is not appurtenant to lands, the fee of which is taken under color of said "rapid-transit act." The said "rapid-transit act" makes no provision for the payment for any property of your orator, nor for the payment for any property of the said Central Tunnel Railway Company, nor for the payment for any property of any of the constituent corporations which were merged and consolidated in your orator, The Underground Railroad Company of the City of New York as aforesaid. The said "rapid-transit act" purports to provide for the payment of compensation to the owners of property, franchises, easements and privileges which are appurtenant to lands which are intended to be acquired under the said rapid-transit act, and which lands are described in certain maps which said rapid-transit act directs to be filed by the said board of rapid-transit commissioners. Said "rapid-transit act" in sections 45 and 46 thereof, provides for the appointment of commissioners of appraisal and the filing of an oath by the said commissioners of appraisal in the office of the clerk of the county in which the city, where said rapid-transit commissioners act, is situated; and in section 47 thereof upon filing said oath in the manner and form aforesaid, "the said city shall be and be-

31 "come seized and possessed in fee or absolute ownership of all "those parcels of property, rights, terms, franchises, easements "and privileges which are in the maps or plans and memoranda "referred to in section 40 of this act, described as parcels of property, "the rights, franchises, easements or privileges which are to be ac-"quired, and also shall become seized and possessed of all the rights, "terms, franchises, easements or privileges appurtenant to any lots "or parcels of property indicated on said maps or plans as parcels in "regard to which it is deemed necessary to acquire such rights, "terms, franchises, easements or privileges or the said rights, terms, "franchises, easements or privileges shall be extinguished as the

"case may be and the said board for the said city may immediately "or at any time or times thereafter take possession or enter into the "enjoyment of the said property, rights, terms, franchises, easements "and privileges or of any part or parts thereof without any suit or "proceeding at law for that purpose, and the said board for the said "city, or any person or persons acting under their or its authority "may enter upon, use, occupy and enjoy in perpetuity all the parcels "of property and all the rights, terms, franchises, easements or privi- "leges appurtenant to any of the parcels of property and all rights, "franchises, easements and privileges, described on said maps or "plans or in said memoranda for any of the purposes authorized "and provided for by this act. But on such filing of the said oath "the said city shall be and become forthwith liable to the respective "owners of the several parcels of property and several rights, terms, "franchises, easements and privileges appertaining thereto, and of "the said rights, franchises, easements and privileges acquired as "aforesaid for the true and respective value thereof, together with "interest thereon from the time of filing the said oath, provided, "however, that no such interest shall be payable to any owner of "any such property, right, term, franchise, easement or privi-
32 "lege during any period during which the said city or said "board of rapid-transit railroad commissioners may by any "resistance, whether by legal proceedings or otherwise of such "owner or with his authority, be prevented from taking possession "thereof or enjoying the same; and provided further, that no action "shall be brought to recover the amount of such value or interest "unless within eighteen months after the filing of such oath, a report "shall not have been duly made by commissioners of appraisal as "herein provided, or such report shall not have been confirmed by "the supreme court as herein provided, so that the said city shall be "liable to forthwith pay the amount by such report ascertained to "be due for such value or interest."

No part of said rapid-transit act makes any provision for the payment of compensation to any owner of property seized or used by said city under color of said rapid-transit act before said city takes possession of the same.

Section 11 of article VIII of the constitution of the State of New York provides as follows: "No county, city, town or village shall "hereafter give any money or property or loan its money or credit "to or in aid of any individual, association or corporation or be- "come directly or indirectly the owner of stock in or bonds of any "association or corporation; nor shall and such county, city, town "or village be allowed to incur any indebtedness except for county, "city, town or village purposes. This section shall not prevent such "county, city, town or village from making such provision for the aid "or support of its poor as may be authorized by law. No such county "or such city whose present indebtedness exceeds 10 per centum of "the assessed valuation of its real estate subject to taxation shall be "allowed to become indebted in any further amount until such in- "debtedness shall be reduced within such limits. This section shall

"not be construed to prevent the issuing of certificates of in-
33 "debtedness or revenue bonds issued in anticipation of the
"collection of taxes for amounts actually contained or to be
"contained in the taxes for the year when such certificates or
"revenue bonds are issued and payable out of such taxes. Nor shall
"this section be construed to prevent the issue of bonds to provide
"for the supply of water, but the term of the bonds issued to pro-
"vide for the supply of water shall not exceed 20 years and a sink-
"ing fund shall be created on the issuing of the said bonds for their
"redemption, by raising annually a sum which will produce an
"amount equal to the sum of the principal and interest of said
"bonds at their maturity. The amount hereafter to be raised by
"tax for county or city purposes in any county containing a city of
"over one hundred thousand inhabitants or any such city of this
"State, in addition to providing for the principal and interest of ex-
"isting debts shall not in the aggregate exceed in any one year 2
"per centum of the assessed valuation of the real and personal estate
"of such county or city, to be ascertained as prescribed in this sec-
"tion in respect to county or city debt."

The population of the city of New York exceeds, and at the times mentioned herein has exceeded, and according to the last preceding State and national census, and according to the State census last preceding May 22d, 1894, and according to the national census last preceding May 22d, 1894, the population of said city exceeded one million inhabitants; and there are more than one million inhabitants in the said city of New York who are also inhabitants of the borough of Manhattan and county of New York. According to the last preceding State census, and according to the State census last preceding May 22d, 1894, and according to the last preceding national census, and according to the national census last preceding May 22d, 1894, the population of no city in the State of New York except the city of New York has exceeded one million inhabitants.

34 Prior to the commencement of the construction of the underground railroad hereinafter described and prior to the attempt to incur on behalf of the city of New York any indebtedness for such construction, the indebtedness of the city of New York, exclusive of certificates of indebtedness and revenue bonds issued in anticipation of the collection of taxes and exclusive of the issue of bonds to provide for a supply of water, exceeded ten per centum of the assessed value of the real estate of the city of New York subject to taxation; and the same is now the case.

The said city of New York is insolvent. Any indebtedness and any claim against the city of New York attempted to be created for the benefit of property-holders upon the route of said underground railroad will be, and any such indebtedness or claim heretofore sought to be created on their behalf is and has been null and void for the reason that the same is and has been forbidden by the said article of the constitution of the State of New York hereinbefore quoted.

The said provision of the said rapid-transit act for the payment of compensation to persons whose property is taken under color of

said act is absolutely void, inasmuch as the same is an infringement of the provision of the fourteenth amendment of the Constitution of the United States, which provides that "no person shall be deprived of property without due process of law;" and the whole of said rapid-transit act is likewise an infringement of said article and of said fourteenth amendment of the Constitution of the United States and is void for the same reason, since it attempts to authorize the acquisition by the city of New York of the title and possession to real and personal property without making any adequate provision for the payment of its value to the owners of the same.

In the matter of Rapid Transit Railroad Commissioners, 5 App. Div. 290, 294, 295, 296, 297, the appellate division for the first department of the supreme court of the State of New York, said, speaking through Van Brunt, P. J.

35 "In a great work like the one proposed it is impossible to "foresee all contingencies, and as the rapid transit commis- "sioners have averred their intention to go as far as the debt limit "will allow in the making of their building contract, there will be no "question but that the boundary will be overstepped because of the "very nature of the enterprise. Besides, by the terms of the act, "the city is bound to indemnify the contractor against many and "divers things as to the expense of which no estimate can be "given * * *.

"There is no restriction upon the rapid-transit commissions as "to the amount they can render the city liable for, a power never "before given to any local board or body, and they may involve the "city in an amount of obligation which would absolutely ruin and "destroy its credit, and bring about as great a disaster as was "occasioned by the collapse of the Panama canal, and all other "public improvements would necessarily be stopped.

"It has been suggested that under the provisions of section 34 of "the rapid-transit act, added to chapter 4 of the Laws of 1891 by "section 9 of chapter 752 of the Laws of 1895, the board of rapid- "transit commissioners is empowered to contract for the construc- "tion of the whole road, or all the roads provided for by their plans, "in a single contract, or may by separate contracts, executed from "time to time, provide for the construction of parts of said road or "roads, or for the construction at first of two or more tracks over "a part of such road or roads, and afterward of one or more "additional tracks over a part or parts of such road or roads as the "necessities of said city or the increase of its population may, in the "judgment of said board, require; and that under this power the "commissioners may delay the construction of sections of the road "until the assessed valuation of the real estate of the city shall "increase to such a sum as would allow the incurring of additional "indebtedness upon the part of the city over and above that which "is now permitted by the constitution.

36 "In respect to this suggestion it would seem to be sufficient "to say that the subsequent provisions of the section in ques- "tion appear to be inconsistent with the right to make entirely sepa- "rate contracts because they require that the contract of construction

"should also provide that the person, firm or corporation so con-
"tracting to construct said road or roads shall, at his or its own cost
"or expense, equip, maintain and operate said road or roads for a
"term of years to be specified in said contract. Hence, if the road
"is to be constructed in sections, there must be sectional provisions
"in regard to operation, and the system would be anything but
"uniform, and uniformity is an absolute necessity.

"This necessity is contemplated by the provision subsequent to
"the first quoted in which it is said that the board may also, in a
"contract for a part of such work insert a provision that, at a future
"time, upon the requirement of the board, the contractor shall
"construct the remainder, or any part of the remainder of said road,
"as the growth of the population or the inter-sts of the city may, in
"the judgment of the board, require; and may, in such contract,
"insert a provision of a method for fixing and ascertaining at such
"future time the amount to be paid to the contractor for such ad-
"ditional construction, and, to the end of such ascertainment, may
"provide for arbitration or for determination by a court for the
"amount of such compensation, or of any other detail of construc-
"tion which shall not be prescribed in the contract, but which shall
"be deemed necessary or convenient by said board. If this power
"is resorted to the obligation is created at the time of the original
"contract, the ascertainment of its amount only being deferred;
"and, hence, it comes within the present prohibition of the consti-
"tution.

"It is to be further observed that the sectional plan assumes
"that the board of rapid transit shall mortgage for a con-
37 "siderable period of years, in the future, the debt-creating
"capacity of the city. Under this scheme it would be impos-
"sible for the city to provide for the purchase of land for, and the
"building of public schools, the improvement of docks, the furnish-
"ing of additional water supply, and the establishment of additional
"parks—all improvements of a permanent character, payment of
"which may properly be provided for by bonds to be payable in the
"future—and the city would lie helpless, bound hand and foot by
"this octopus of debt created by these rapid-transit contracts."

In the same case Mr. Justice Rumsey, said (at pp. 300, 301, 307, 308).

"In this consideration we are to throw out the question of profit
"to the city. By the terms of the contract the city is not expected
"to receive any profit from the operation of this road. The benefits
"which it must derive are entirely consequential and such as arise
"from the increased convenience to great numbers of its inhabitants,
"and the probable enhancement of values of property in certain
"portions of the city. The only money which the city is at all
"likely to get from the operation of the road is the annual interest
"upon certain portion of the bonds which it is required to issue, and
"one per cent. per annum in addition for a sinking fund to be pay-
"able after a certain time. It is quite clear that the sum to be paid
"to the city will not recompense it for the interest upon the bonds
"which it is to issue. These bonds are to bear interest at the rate

"of three and one-half per cent. per annum. The rental is to be "estimated not upon all the bonds which shall have been issued, but "upon such of them as shall be left after deducting the bonds which "shall have been issued to pay for rights, terms, easements, privi- "leges or property other than lands acquired in fee. So that it will "be seen that the amount of bonds issued by the city will be very
"much larger than the total amount of those upon which the
38 "interest by way of rentals shall be paid. In addition to
"that must be considered the sum which the city may be "compelled to pay by reason of its liability for interference and "damages spoken of above, the amount of which cannot be es- "timated. * * *

"It is plain that the city is not now in a position to incur any "such indebtedness. The assessed valuation of the city is something "over $1,646,000,000. The actual debt now existing, not including "outstanding obligations, is something over $100,000,000. The limit "of the constitutional power to incur indebtedness is $164,600,000, "leaving as the amount of indebtedness which the city may incur "above its present indebtedness, $55,000,000. But we are bound to "know that outstanding obligations have consumed a considerable "portion of that amount. The bonds which the city must issue for "obligations already incurred is upwards of $19,000,000, which "would leave only $36,000,000 that could be issued for this pur- "pose. It is conceded on all hands that such a sum is entirely "insufficient for the completion of this work. But if even that "amount of bonds should be issued, thus bringing the indebtedness "of the city up to its full limit, there is no doubt that the results "might be quite serious. From that time on all expenses, however "onerous, could be met only by taxation. In whatever public en- "terprise it should be necessary to engage, from any unforeseen ex- "igency which might arise, there would be no power to incur any "indebtedness, however useful the existence of such a power might "be. If it should be necessary to build school-houses, or to improve "the water front, or to repave a street, each of those things could be "done only upon the condition that the money to pay for it should "be at once raised by taxation. The serious consequences of such "a condition of affairs can easily be understood. The actual neces- "sity of leaving some margin of the power to incur indebtedness so
"that the city may provide for unforeseen emergencies must
39 "be conceded, and the propriety of undertaking any enter-
"prise which would take away that power must be seriously "questioned. But if as is quite possible the work should prove con- "siderably more expensive than the estimates, the consequences "would be much more serious. In that case, undoubtedly, the work "must stop, or it could be continued only by a resort to direct tax- "ation to pay for it, which, added to the necessary taxation for the "expenses of the city government, might be exceedingly oppressive. "If taxation should not be resorted to, the necessary result would "be that the work would come to an end, and probably the money "already invested would be totally lost."

In matter of Rapid Transit Commissioners, (23 App. Div. 472, 473, 474, 475), the same court said through Van Brunt, P. J.:

"The report of the supreme court commissioners concedes, and the "arguments of the counsel in favor of the application seem to admit, "that if the total cost of the building of the proposed rapid-transit "road is to be deemed as incurred by the city at the time of the "making of the contract, and there is added to this all the indebt- "edness of the city of New York then existing, whether funded or "contingent, and its obligation to assume, on the first day of January "of the coming year, the indebtedness of the adjacent cities and "counties, as provided by the new charter, the limit of indebtedness "will be exceeded. Whether any of these elements can be excluded "in the determining as to the legality of any contract which the "rapid-transit commissioners might make or propose to make for "the building of this road, presents serious questions of law which "in my judgment ought not to be determined upon this applica- "tion, for the reason that if the court upon this application should "come to a conclusion upon these questions adverse to the legality "of such proposed contract, no review could be had of its determina- "tions although involving only questions of law.

40 "It is stated in the report of the supreme court commission- "ers that the suggestion that no contract for the construction "of the road can be made without *ipso facto* creating a debt to the "full extent of its estimated cost is not reasonable. The question of "the reasonableness of a constitutional inhibition is not open to dis- "cussion, and an examination of the authorities of this State upon "the question of what constitutes indebtedness or debts may show "that this unreasonable proposition has very respectable authority, "viz., our court of appeals.

"It cannot for a moment be assumed in considering these ques- "tions that independent and separate contracts of construction with "different contractors could, from time to time be entered into, for "the reason that every contract for construction must necessarily "embrace a contract for the operation of the line by the construct- "ing contractor, and to have the operation of the rapid-transit sys- "tem controlled by divers and various operators would of itself "necessarily absolutely condemn the scheme. It would seem, there- "fore, that the contract initiating the work must also contain pro- "visions for its completion and final operation. It is proposed by "deferring construction and payment to throw (as it is stated) the "indebtedness into future years, and thus obviate the constitutional "objection.

"It is further urged that a considerable amount of the apparent "indebtedness of the city of New York is only imaginary and not "real; that, for example, assessment bonds are outstanding which, "it is anticipated, will in the future be paid by the receipt of assess- "ments for the benefit levied upon neighboring property; that land- "acquired for Croton aqueduct purposes which are to be used only "for subsurface constructions, may be sold for nearly what was "paid for them, and that indebtedness, thus reduced, and that the "excess of indebtedness of the adjacent cities and counties over the

"limit provided by the constitution is not to be charged
41 "against the city at this time, because the actual assumption
"has not taken place, although the obligation to assume at
"present exists. *Whether these devices in respect to the contract and "these theories as to the indebtedness of the city, will finally obtain, ought "to depend upon the decision of our court of last resort, and should not "be determined as has already been stated in this proceeding, where they "cannot be reviewed.*"

These questions have never been considered by the New York court of appeals.

In the same case Mr. Justice Ingraham dissented and said among other things, (at p. 486),

"In the case of Berlin Iron Bridge Co. *v.* City of San Antonio "(62 Fed. Rep. 882) the same construction was given to a provision "of the constitution of the State of Texas, and it was held that a "contract to build a bridge, made by a city, by which the city obli-"gated itself to pay a sum of money for the building of such bridge, "created a debt, and that such contract was not binding upon the "city, being prohibited by the constitution of the State of Texas, "which provided that no debt shall ever at any time, be created by "any city, except upon conditions which were not complied with in "the execution of the contract in question."

IX. By the filing of its articles of association in the office of the secretary of state of New York as above set forth and by the other proceedings connected with its incorporation and its corporation action the said Central Tunnel Railway Company entered into a contract with the State of New York which bound and obliged the State of New York to secure to and give to the said Central Tunnel Railway Company the exclusive right and franchise to construct and operate an underground railroad and tunnel upon the route specified in its articles of association. The said contract and the said franchise are property, and by the proceedings of merger and consolidation hereinabove set forth they have been assigned to and vested in your orator who holds the same as its prop-
42 erty. The said rapid-transit act is an impairment of the obligation of that contract, and consequently the same is void as a violation of the Constitution of the United States. The said rapid-transit act is likewise void as an infringement of the fourteenth amendment of the Constitution of the United States because it takes the property of your orator for a private use without compensation and without due process of law.

X. By their said incorporation and the filing of their articles of association in the office of the secretary of state of New York and by the other proceedings connected with their incorporation and their corporate action, your orators entered into a contract with the State of New York which bound and obligated the State of New York to secure to and give to your orators the exclusive right and franchise to construct and operate an underground railroad and tunnel upon the said route specified in its articles of association. The said rapid-transit act is an impairment of the obligation of that contract, and consequently the same is void as a violation of the Constitution of the

United States. The said rapid-transit act is likewise void as an infringement of the fourteenth amendment of the Constitution of the United States because it takes the property of your orators for a private use without compensation and without due process of law.

XI. Section 10 of article VII of the constitution of the State of New York provides: "Neither the credit nor the money of the State "shall be given or loaned to or in aid of any association, corpora- "tion, or private undertaking." The said rapid-transit act gives and loans the credit of the State of New York to a private undertaking, namely, the construction and operation of railroads by the contractor with said rapid-transit board. The said rapid-transit act is for that reason also unconstitutional and void and a violation of that provision of the State constitution.

43 XII. Section 18 of article III of the constitution of the State of New York provides as follows: "The legislature "shall not pass a private or local bill in any of the following cases." Amongst the cases therein enumerated in which the legislature is forbidden to pass a private or local bill are included the following: bills "granting to any corporation, association, or individual the "right to lay down railroad tracks;" and bills "granting to any "private corporation, association or individual any exclusive privi- "lege, immunity or franchise whatever."

The said so-called rapid-transit act virtually and in effect grants to a private individual, namely, to the person who makes a contract with said city of New York through said rapid-transit commission, the right to lay down railroad tracks. The said rapid-transit act also grants to such individual an exclusive privilege, immunity and franchise. It is claimed, however, by the defendants herein that the right to lay down said railroad tracks granted by said rapid-transit act is granted not to any private corporation or individual but to the city of New York. If that be the correct construction of said act, said act is still void, as a violation of said article in said constitution, inasmuch as the city of New York is a public corporation, and is so described in the statutes of the State of New York and by the common law which existed prior to the adoption of the constitution of the State of New York. The omission of the adjective "private" from the clause in said constitution forbidding the "granting to any corporation, association or individual the right to "lay down railroad tracks" together with the use of the said adjective "private" in the immediately succeeding clause of the same section, which forbids the "granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever," shows clearly that it was the intention of the said constitution and of the people of New York when the same was adopted

44 to forbid the grant to any corporation, public or private, of the right to lay down railroad tracks.

XIII. Since the approval by the governor of the State of New York of the bill designated as chapter 752 of the Laws of 1894, which named certain individuals as members of the board of rapid transit and as commissioners of rapid transit, William Steinway has died, and Seth Low and John Claflin have resigned from the board which

said bill thus attempts to create as aforesaid. The other members of said board have gone through the form of electing to fill the vacancies in said board thus and otherwise created the defendants Woodbury Langdon, George L. Rives, and Charles L. Smith. The defendant, Morris K. Jessup, has since been elected by the chamber of commerce of the State of New York as president of the such chamber of commerce. The said persons who have been thus in form elected to fill the vacancies in said board have since claimed the right to act as members of said board and are now acting as such.

Section 2 of article X, constitution of the State of New York, provides as follows: "All city, town and village officers whose election "or appointment is not provided for by the constitution shall be "elected by the electors of such cities, towns and villages or of some "division thereof, or appointed by such authorities thereof as the "legislature may designate for that purpose."

The said defendants except the mayor and comptroller who are members of and constitute the rapid-transit commission, claim to act and they are discharging the duties of city officers, and the duties, powers and functions which the said rapid-transit act purports to give them are the duties, powers and functions of city officers. None of them except said mayor and comptroller has been elected by the voters of the city of New York or elected or appointed by any municipal authority. No appointment to said commission could lawfully or constitutionally be made under the constitution of the State of New York and under the fourteenth amendment of the Constitution of the United States except by the election of the electors of the State of New York or by appointment of the municipal authorities of the city of New York duly elected by the people of the city of New York. The authority claimed by said commissioners and which they have sought to exercise to fill vacancies in their body, and to expend the funds of the city of New York both before and since said vacancies occurred, and the authority that said act purports to grant to them so to do, is an attempt to create a close corporation and to otherwise proceed in a manner forbidden by the constitution of the State of New York, and in a manner forbidden by the fourteenth amendment of the Constitution of the United States and is not "due process of law."

As said by the New York court of appeals speaking through Judge Cullen in the case of Fox against the Mohawk and Hudson River Humane Society, (165 N. Y. 525), "It is in substance devolving "the choice of public officers on a few citizens and possibly persons "not citizens, while under the constitution, all public officers must "be elected or appointed by other public authorities, and thus trace "their title to power and authority either immediately or immedi-"ately back to the sovereign in this country, the people." By the death and resignations above described said board of rapid-transit commissioners is without a quorum and could not legally act, even if the same had been legally created and constituted until said vacancies had been filled by persons legally appointed. If the said rapid-transit act is not a local bill, said rapid-transit act is further

void for the reason that it appoints persons who are citizens and residents of the city of New York officers of other cities in the State of New York.

46 XIV. Under color of said rapid-transit act the said board of rapid-transit railway commissioners has determined upon the construction of an underground railroad in the city of New York upon the route specified in the articles of association and said maps of the said Central Tunnel Railway Company and of your orators. Said board has adopted and projected general and detailed plans and specifications for the construction of such an underground railway or railways. The plans and specifications thus adopted by said board were prepared by Mr. William E. Worthen and John Bogert, engineers who had formerly been in the employ of said Central Tunnel Railway Company, and they were substantially the same plans and specifications for an underground railway upon said route that had previously been adopted and projected for the construction of the railroad and tunnel of the Central Tunnel Railway Company and of your orators. The common council, the mayor, and the local authorities of the city of New York in accordance with the provisions of the constitution of the State of New York and in accordance with the provisions of said rapid-transit act have duly given their consent to the construction of an underground railroad and tunnel upon the route specified in the articles of association and said maps of the said Central Tunnel Railway Company and upon the said Central Tunnel Railway Company and of your orators. The appellate division of the supreme court for the first department has upon the application of said rapid-transit board made in accordance with and under color of said rapid transit act appointed three commissioners to determine after a hearing of all parties interested whether an underground railroad and tunnel ought to be constructed and operated upon the route specified in the articles of association and said maps of the said Central Tunnel Railway Company and of your orators. Said commissioners after

47 duly hearing all parties interested in accordance with the said constitution and the said rapid-transit act have duly determined that such a railroad and tunnel should be constructed and operated upon said route. Their determination in accordance with said constitution and the said rapid-transit act has been duly approved by the said court and has been taken in lieu of the consent of the property-owners of property bounding upon said route. The date of the approval of said court was on or about April 6, 1898.

Thereupon, by the entry of such order, said appellate division perfected and confirmed as your orators are informed and believe the right of your orators and the exclusive franchise of your orators to construct a street railroad and tunnel upon said route. But the said defendants by force and threats have hitherto prevented your orators from constructing the same.

Thereafter and on or about February 24, 1900, said rapid-transit board under color of said rapid-transit act entered into a contract with the defendant John B. McDonald by which said board purported

to bind the city of New York to pay to said defendant McDonald the sum of thirty-six millions five hundred thousand (36,500,000) dollars for the construction of an underground railroad and tunnel in the city of New York over the said route to which an exclusive right and franchise has been acquired by your orators as aforesaid and purported to grant to said defendant McDonald the right to operate a railroad upon said route for the period of fifty years with the right to renew the same for a further period of twenty-five years.

XV. Said rapid-transit contract was entered into by mistakes of fact and law on the part of the said rapid-transit commissioners and on the part of the city of New York; and by fraud, imposition and undue influence, practiced upon them by the said defendant John B. McDonald and by the said Rapid Transit Subway Construction Company and by persons with great political influence in the city of New York, some of whom were city officers, who were secretly interested in the said contract and in the said Rapid Transit Subway Construction Company and who dominated the
48 action of the persons who executed said rapid-transit contract on the part of the city of New York. Amongst other mistakes on the part of said rapid-transit board and said city of New York was the following material mistake under the influence of which said rapid-transit contract was executed. Said board and said city believed when said contract was executed that sections 3 and 14 of the labor law of the State of New York, namely, chapter 415 of the Laws of 1897, were valid legislative enactments, which were not repugnant to the constitution of the State of New York; and they believed the statement and promise, which were made to them by said John B. McDonald before said rapid-transit contract was executed, that he intended to and that he would obey said sections of said labor law, pay and compel the payment of the prevailing rate of wages to all workmen upon said railroad subway and tunnel, and use no stone in said construction that had been worked, dressed, or carved outside of the State of New York. For that reason a clause was inserted in said rapid-transit contract wherein and whereby said McDonald promised to obey said sections of said labor law and it was provided that in case of his disobedience to the same said contract should be null and void and the compensation for said construction was fixed in said contract at an amount at least twenty (20) per centum in excess of the price at which the same would have been fixed had said clause not been inserted in said contract and had said promise and representation not been made by said defendant McDonald. When he made said promise and representation and before said rapid-transit contract was executed, said defendant McDonald had been advised by his counsel that said sections of said labor law were unconstitutional and void and that said clause in said contract was not binding upon him, and he intended not to comply with nor to obey said sections of said labor law and said clause of said rapid-transit contract. Sub-

sequently to the execution of said rapid-transit contract he
49 combined with other contractors and procured the institution and argument by his counsel of two test cases before the court of appeals of the State of New York in which said court held that parts of said sections in said labor law were unconstitutional and void and that similar clauses in contracts with the city of New York were not binding and could be violated and disobeyed without prejudice to the clauses in such contracts that were beneficial to the contractors; and he has since violated and disobeyed and he intends in the future to violate and disobey said sections of said labor law and said clauses in said rapid-transit contract, and laborers are and have been working more than eight hours a day upon said work. Said rapid-transit commissioners before awarding said rapid-transit contract to said defendant McDonald, went through the form of issuing an invitation for proposals and bids for said contract, in accordance with the draft of said contract included in said invitation by them. Before said rapid-transit contract was executed they secretly agreed with said defendant McDonald that the terms of the same would be modified so as to diminish by one-half the security for the performance of the said contract, required from the said McDonald in the draft of the contract as originally submitted and as incorporated in said invitation; and upon the same day that the said rapid-transit contract was executed an agreement was made purporting to be a modification of said contract in that respect; and no security in accordance with the original contract and the original invitation to submit proposals and bids for said contract has been given by the said McDonald or by any one. The said agreement modifying said contract was in violation of the laws of the State of New York, and the circumstances of the execution of the same make it void. Had it been announced in the said invitation to contract that said rapid-transit contract would be thus modified
50 and that the security for its performance would be thus diminished, other contractors would have offered to accept said contract for much less compensation than is under the provisions of said contract to be paid to the said defendant McDonald. The said defendant McDonald and the Rapid Transit Subway Construction Company and the persons who own the legal and equitable interests in the stock and control the said construction company have procured through persons who represent them the organization of a corporation named the Subway Realty Company; and they own the equitable and controlling interest in the stock of said realty company. In the name of said Subway Realty Company they have been engaged in and they threaten to engage in the purchase of real estate necessary for the construction and operation of said railroad for the purpose of leasing or selling the same or parts thereof to the city of New York at an exorbitant price. Such conduct by him and by them is a violation of the express and implied terms and conditions of said rapid-transit contract. Said rapid-transit contract is for these and other reasons void and not binding upon the city of New York.

XVI. Said contract and the purported right to said lease have been

assigned by said McDonald with the consent of said rapid-transit commissioners to the defendant, The Rapid Transit Subway Construction Company, which is a domestic corporation organized under the business corporation law of the State of New York; a copy of the articles of incorporation of which is hereto annexed, marked C; and which has no power under said law nor under its articles of incorporation either to construct or to operate a railroad. Since its incorporation the said Rapid Transit Subway Construction Company has applied to the legislature of the State of New York for authority to construct and operate said railroad, but said legislature has refused to grant to the said Rapid Transit Construction Com-
51 pany any authority either to construct or to operate that or any railroad. The said underground railroad is now in process of construction by said defendants McDonald and The Rapid Transit Subway Construction Company upon the route to which your orator and the predecessor of your orator have an exclusive right and franchise as aforesaid, and they have taken exclusive possession of the said route in defiance of the rights of your orators as aforesaid. Large sums of money have already been paid said last-named defendants for such construction by the city of New York and the comptroller and other officers of the same.

XVII. By the law in force in the State of New York the right to construct, and the right to operate a railroad is a franchise, which cannot exist nor be exercised without express statutory authority. The rule and policy of the State of New York is to permit the exercise of such a franchise by no person except a corporation organized under the railroad laws or transportation corporation laws of said State. The courts of the State of New York have established the rule of statutory construction in that State, that no general language in a statute, even though when literally construed it might be taken to grant such a right or such a franchise to an individual, or to a natural person, as well as to a corporation or an artificial person, shall be given that interpretation; but that such a grant in general language shall be confined to corporations organized under the railroad laws, or laws concerning transportation corporations. For example, it has been held that a statutory recognition of the right to lease a railroad "to any person or persons" does not refer to, nor recognize a lease of a railroad to a private individual.

The railroad laws and the laws authorizing the incorporation of transportation corporations, and all laws authorizing the construction and operation of railroads in said State, provide that the
52 persons who construct and operate railroads therein shall be corporations which shall possess a specified amount of paid-up capital proportioned to their mileage; that they shall be subject to the supervision of specified State officers; and that they shall observe certain regulations for the protection of passengers, neighboring land-owners and the public at large, for violations of which these laws subject them to specific penalties. No such provisions are contained in said rapid-transit act. If said rapid-transit act grants or purports to grant the right to construct or the right to operate a railroad to a natural person or to an individual who may

contract with said rapid-transit commissioners, or to any corporation not organized under the railroad laws nor under the laws concerning transportation corporations in said State, said rapid-transit act denies to your orators and to the corporations operating railroads and to those who have constructed and which are about to construct railroads in that State, and to the persons who intend or desire to organize corporations for that purpose and denies to all other persons in said State, except such contractor with said rapid-transit commissioners and his assigns, the equal protection of the laws of the State of New York, and the same is void as a violation of the fourteenth amendment to the Constitution of the United States. The action of said rapid-transit commissioners and of the city of New York in making such a contract with said John B. McDonald and in recognizing and consenting to his assignment of that contract to the said Rapid Transit Subway Construction Company, which was organized under the business corporation law of that State for the purpose of constructing and operating said rapid-transit railroad and not under the railroad laws nor under the transportation corporation laws of that State, is, as said by the Supreme Court of the United States, speaking through Mr. Justice Matthews in Yick Wo *vs.* Hopkins (118 U. S. 356, 373, 374), irrespective
53 of the question whether such contract is authorized by the rapid-transit act, an application of that rapid-transit act by the public authorities charged with its administration "and thus "representing the State itself, with a mind so unequal and oppres- "sive as to amount to a practical denial by the State of that equal "protection of the laws which is secured to" your orators, as to all "other persons" by the broad and benign provisions of the four- "teenth amendment to the Constitution of the United States. "Though the law itself be fair on its face and impartial in appear- "ance, yet, if it is applied and administered by public authority with "an evil eye and an unequal hand so as to practically make unjust "and illegal discriminations between persons in similar circum- "stances, material to their rights, the denial of equal justice is still "within the prohibition of the Constitution."

XIX. The said defendants John B. McDonald and The Rapid Transit Subway Construction Company threaten to, and unless enjoined by this honorable court they will complete the construction of an underground subway tunnel and railroad upon the route specified in the articles of association and said map of the Central Tunnel Railway Company and of your orators, the exclusive right and franchise to construct which is owned by your orators as aforseaid; and they threaten to, and unless enjoined by this honorable court, they will operate a railroad upon said route. If allowed to complete the construction of said railroad said defendants will make it impossible for your orators to construct and to operate a railroad upon said route as aforesaid, and they will render valueless and destroy the said franchise owned by your orators aforesaid. The defendants The City of New York, The Mayor and Comptroller of the City of New York, and the defendants who are or claim to be rapid-transit commissioners, and each of them, threaten to, and unless enjoined by this hon-

orable court they will assist said defendants McDonald and
54 The Rapid Transit Subway Construction Company in the construction and operation of said underground railroad; and they threaten to, and unless enjoined they will prevent your orators from constructing and from operating the said railroad specified in the articles of association and said map of said Central Tunnel Railway Company and from exercising the said franchise owned by your orators as aforesaid; and they threaten to, and unless enjoined they will in order to procure money for that purpose, issue negotiable bonds of the city of New York and sell the same to purchasers who act in good faith without notice of the infirmity in and illegality of said bonds. The said issue and sale of such bonds unless enjoined will create a claim on behalf of the holders thereof that the same are valid and enforceable obligations of said city; and may increase the burden of taxation upon your orators and other tax-payers in the city of New York; and may give rise and color to a claim, that your orators are estopped from disputing the validity of said bonds and from opposing the further construction by defendants of said underground railroad and tunnel

XX. Before the beginning of the construction of the said underground railroad and subway by said defendants McDonald and The Rapid Transit Subway Construction Company, your orators duly notified the defendants The City of New York, its officers, said rapid-transit commissioners, the defendant McDonald and the persons who afterwards organized said Rapid Transit Subway Construction Company, that your orators had and owned the exclusive right and franchise to construct and operate an underground railroad and tunnel on the route specified in the articles of association and said maps of the Central Tunnel Railway Company; and your orators duly and publically protested against the acts of said defendants hereinbefore described. More than thirty days before this bill in equity was filed, your orators duly served upon the
55 defendants The Mayor and Comptroller of the City of New York and duly filed in the office of the counsel to the corporation of the city of New York the claim set forth in this bill and a notice of the intention of your orator to commence this suit.

XXI. Your orators hereby offer to pay and tender to the defendant The City of New York the whole amount of money heretofore paid by said city to the defendants John B. McDonald and The Rapid Transit Subway Construction Company, and to each of them, for the construction of a railroad and tunnel upon the route specified in the articles of association and map of said Central Tunnel Railway Company; and your orators offer to complete the construction of said railroad in accordance with the plan and specifications prescribed by said rapid-transit commissioners; and to operate the same in accordance with the statutes of the State of New York; and your orators offer to pay the prevailing rate of wages to all workmen employed upon said construction and to use no stone in said construction that has been worked, carved or dressed outside of the State of New York and to have no workmen employed upon said construction work more than eight hours a day; and to obey all of

sections 3 and 4 of the labor law of the State of New York; and your orators offer to do anything further that equity requires in the premises.

Inasmuch, therefore, as your orators have no adequate remedy at the common law nor except in this honorable court, sitting in equity, and to the end, therefore that the defendants may, if they can show why your orators should not have the relief hereby prayed, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best of their knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived; your
56 orators pray: (1) That your honors may grant writs of injunction both interlocutory until the entry of the final decree herein and also under such final decree perpetually restraining the said defendants and each of them, their officers, attorneys, agents, servants and workmen and the officers, attorneys, agents, servants and workmen of each of them from constructing and from operating and from continuing the construction of a tunnel, a subway, a railroad, and any one or more of said things, upon the route specified in the articles of association and map of the Central Tunnel Railway Company namely, from a point at or near the City Hall park in said city of New York, and running thence northerly to, and under Chambers street, and through the block to and under Reade street to Elm street, thence northerly through and under Elm street, to and under Spring street, and through the blocks to and under the cross-streets, to and under Great Jones street, thence cross-streets, to and under Great Jones street, thence northerly through and under Lafayette place, to and under Astor place and Eighth street, thence northerly and through the blocks to and under Ninth street to Fourth avenue, thence northerly through and under Fourth avenue to and under 42d street to or near the Grand Central depot, connecting with the Fourth Avenue improvement; and upon the route specified in the map and articles of association of the Rapid Transit Underground Railroad Company namely: From a point at or near the post-office building, City Hall park, in said city of New York, and running thence northerly under Park row and Centre street, and through the block to and under Reade street, to *new* Elm street thence northerly, through and under Elm street, and under the cross-streets, to, and under Spring street and Marion or Mulberry streets thence northerly through the blocks and under the cross-streets to, and under Great Jones street, thence northerly
57 through and under Lafayette place to, and under Astor place and Eighth street, thence northerly and through the blocks to, and under Ninth street to Fourth avenue, thence northerly through and under Fourth avenue and under the cross-streets to and under Forty-second street, to or near the Grand Central depot, thence westerly through and under Forty-second street, and the cross-streets to Broadway, thence northerly through and under Broadway, and under the cross-streets to, and under 59th street, thence northerly through and under the Boulevard and Eleven-h avenue, and under

the cross-streets to 124th street, thence northerly on over and along the line of Eleventh avenue, and over the cross-streets to 134th streets, thence through and under Eleventh avenue and under the cross-streets to, or near 155th street; and upon any part of said routes; and from interfering with the construction and operation of an underground railroad and tunnel by your orator upon said route;

(2.) That your honors may grant writs of injunction interlocutory and final perpetually enjoining and restraining the defendants The City of New York, The Mayor *and Comptroller of the City* of New York and said Rapid Transit Commissioners and each of them, their officers, attorneys, agents, servants and workmen and the officers, agents, attorneys, servants and workmen of each of them from paying any money under color of said rapid-transit act to the defendants McDonald and The Rapid Transit Subway Construction Company, and to either of them, and from paying any money to any one under color of said rapid-transit act, and from signing and from countersigning and from issuing and from authorizing the issue of any warrants upon the treasury of the city of New-York under color of said rapid-transit act; and from signing and from countersigning and from selling and from issuing any bonds and any stock of the city of New York under color of said rapid-transit act or to obtain money to aid in the construction of said railroad or tunnel.

58 (3.) That your honors may appoint forthwith a receiver to take possession, hold and preserve so much of the railroad tunnel and subway as is already constructed upon said route.

(4.) That your orators may have such other and further relief in the premises as may be just and meet, with the costs of this suit.

(5.) May it please your honors to grant unto your orators, not only writs of injunction and a receiver conformable to the terms of this bill, but also a writ of subpœna of the United States of America directed to the said Robert A. Van Wyck, individually and as mayor of the city of New York; Bird S. Coler, individually and as comptroller of the city of New York; Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith, Morris K. Jesup, individually and as members of the pretended board of rapid-transit commissioners of the city of New York, John B. MacDonald, the Rapid Transit Subway Construction Company, and the City of New York, commanding them and each of them on a day certain to appear and answer unto this bill of complaint and to abide and perform such order and decree as to this honorable court shall seem proper and required by the principles of equity and good conscience; and your orator will ever pray, &c.

JAMES M. FISK,
Attorney and Solicitor for Complainants,
99 Nassau Street, New York.

ROGER FOSTER, *Of Counsel.*

59 EXHIBIT A.

Article of Association of the Central Tunnel Railway Company.

Know all men by these presents: That we the undersigned, under and in pursuance of an act of the legislature of the State of New York, entitled "An act to authorize the formation of railroad corporations, and to regulate the same," passed April 2, 1850, and the acts amendatory thereof and supplementary thereto, and especially in pursuance of the act of the said legislature, entitled "An act to provide for excavating and tunneling, and bridging for transportation purposes, within villages and cities of this State," passed June 25, 1880, have associated ourselves together for the purpose of constructing and maintaining and operating a railroad for public use in the conveyance of persons and property, and for that purpose have made, signed, and executed these articles of association.

First. The corporate name of said company shall be "The Central Tunnel Railway Company."

Second. The company is to continue in existence for the period of ninety-nine years.

Third. The places from and to which said railroad is to be constructed, maintained and operated, are as follows: Commencing at or near City Hall park, in the city, county and State of New York, and terminating to or near the Grand Central depot at 42d street in said city, county and State.

Fourth. The length of said railroad, as nearly as may be estimated, is five miles, and the same is intended to be constructed from a point at or near the City Hall park in said city of New York, and running thence northerly, to and under Chambers street,
60 and through the block to and under Reade street to Elm street, thence northerly through and under Elm street to and under Spring street, thence northerly through the blocks and under the cross-streets to and under Great Jones street, thence northerly through and under Lafayette place to and under Astor place and Eighth street, thence northerly and through the blocks to and under Ninth street to Fourth avenue, thence northerly through and under Fourth avenue to and under 42d street to or near the Grand Central depot connecting with the Fourth Ave. improvement.

Fifth. The amount of capital stock of said railroad company shall be five millions of dollars, consisting of fifty thousand shares of one hundred dollars each.

Sixth. The names and places of residence of thirteen directors of said company, who shall manage its affairs for the first year, and until others are chosen in their places, are as follows, to wit:

John Cochrane, New York city; G. Tillotson, of New York city; S. D. Schuyler, New York city; C. B. Meserole, New Rochelle, N. Y.; Henry C. Stetson, of New York city; William Kent, New York city; H. F. Pultze, New York city; W. C. Nicoll, New York city; Wm. E. Worthen, New York city; Stephen O. Lockwood, New York city;

Ogden P. Pell, New York city; John Schuyler, Pelham, N. Y., Richard Ogden, New York city.

In witness whereof, we have hereunto respectfully subscribed our names and places of residence, and severally agree to take the number of shares of stock of said company, set opposite our respective names.

Names.	Residences.	No. of shares.
H. F. Pultze	New York city	2
James T. Waters	Nyack, N. Y.	2
John Schuyler	Pelham, N. Y.	2
John McCrackan	New York city	2
George W. Goodman	South Orange, N. J.	2
61 William Kent	New York city	2
Eugene Schieffelin	New York city	2
W. C. Nicoll	New York city	2
G. Tillotson	New York city	2
Rob't Jones	New York city	2
H. C. Stetson	New York city	2
S. D. Schuyler	New York city	2
George Lorillard	New York city	2
Abel Denison	Brooklyn, N. Y.	2
C. B. Meserole	New Rochelle, N. Y.	2
Ogden P. Pell	New York city	2
Stephen O. Lockwood	New York city	2
N. Denison Morgan	New York city	2
John Cochrane	New York city	2
Wm. E. Worthen	New York city	2
James B. Johnston	New York city	2
C. Merighi	New York city	2
Richard Ogden	New York city	2
Geo. F. Riley	New York city	2
George Godfrey, Jr.	New York city	2

STATE OF NEW YORK, }
City and County of New York, } ss.:

John Schuyler, Wm. Kent and Gouverneur Tillotson, being each for himself — depose and say: That he is a director of the Central Tunnel Railway Company; that he is named in the articles of association of said company as a director.

That the amount of stock required by the second section of an act of the legislature of the State of New York, entitled "An act to authorize the formations of railroad corporations, and to regulate the same," passed April 2, 1850, has been in good faith subscribed, and that ten per cent. thereon has been paid in good faith and in cash to the directors of said company, and that it is intended in good faith to construct, maintain and operate the road mentioned in said articles of association.

JOHN SCHUYLER.
WILLIAM KENT.
G. TILLOTSON.

62 Sworn to before me this 25th day of March, 1881.

WM. F. LEFT,

[SEAL.] *Notary Public, New York County.*

Articles of association of the Central Tunnel Railway Company, State of New York, office of the secretary of state. Filed and recorded March 26th, 1881. Anson Wood, deputy sec'y of state.

We, the undersigned, being a majority of the board of directors of the Central Tunnel Railway Company, do hereby certify, that the foregoing articles of association are the articles of association of said company as amended by the board of directors, thereof, at a meeting duly called and held on the 12th day of November, 1881, and that said amended articles are made to cure an informality which exists in the present articles now on file in the office of the secretary of state, at Albany, N. Y., said informality consisting of this, to wit: That the said original articles do not in the body thereof state the places of residence of the persons therein named as directors of said company, and are made and filed in said secretary of state's office to conform to the general act under which said corporation was organized, and under and in pursuance of the act of the legislature of the State of New York, being § 1 of chap. 135 of the Laws of 1870.

Witness our hands this twelfth day of November, 1881.

G. TILLOTSON.
STEPHEN O. LOCKWOOD.
WILLIAM KENT.
JOHN COCHRANE.
H. C. STETSON.
S. D. SCHUYLER.
W. C. NICOLL.

63 We hereby certify that at a meeting of the board of directors of the Central Tunnel Railway Company, held on the twelfth day of November, 1881, pursuant to due notice, a majority of said board being present, the following preamble and resolution *was* unanimously adopted, viz:

"Whereas, the articles of association of the Central Tunnel Railway Company filed in the office of the secretary of state, at Albany, on the twenty-sixth day of March, 1881, omit to state in the body thereof the places of residence of the persons therein named as directors of said company." And

"Whereas, such omission is a technical irregularity which may be cured by filing amended article- under the provisions of chap. 135 of the Laws of 1870." Now therefore,

"Resolved, That amended articles of association be made and filed in the office of said secretary of state, for the purpose of correcting such irregularity, and that the same be certified by the board of directors of said company."

JOHN COCHRANE, *President.*

WILLIAM KENT, *Secretary.*

EXHIBIT B.

Order Appointing Commissioners.

At a general term of the supreme court held in and for the first judicial department at the county court-house in the city of New York on the second day of February, 1883.

Present: The Hon. Noah Davis, presiding justice. The Hon. John R. Brady, The Hon. Charles Daniels, justices.

64 In the Matter of THE CENTRAL TUNNEL RAILWAY COMPANY.

On reading and filing the petition of the Central Tunnel Railway Company duly verified on the twenty-seventh day of June, 1882, and the affidavit of John Schuyler, chief engineer of said petitioner, verified on the twenty-sixth day of June, 1882, and of Solomon Cohen, verified on the fourth day of May, 1882, and of Henry C. Stetson verified on the sixth day of May, Benjamin Richards, Jr., verified on the 27th day of June, 1882, and upon the plans and routes of the petitioner heretofore filed in the office of the register of the city and county of New York and the assessment-rolls for the year 1881 of property on Fourth avenue between Forty-second street, and Eighth street, and on Lafayette place between Eighth street and Great Jones street, and on Elm street between Spring street and Chambers street, in the city of New York, on file in the tax office of said city. And it satisfactorily appearing to the court that the petitioner is a railroad company formed under chapter 140 of the Laws of 1850—known as the general railroad act, entitled "An act to authorize the formation of railroad corporations, and to regulate the same," and all acts amendatory thereof, or supplementary thereto, and incorporated for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property in the city of New York, commencing at a point at or near the City Hall park in said city, and running thence northerly to and under Chambers street, and through the block to and under Reade street to Elm street, thence northerly through and under Elm street to and under Spring street, thence northerly through the blocks and under the cross-streets to and under Great Jones street, thence northerly through and under Lafayette place to and under
65 Astor place and Eighth street, thence northerly and through the blocks to and under Ninth street to Fourth avenue, thence northerly through and under Fourth avenue to and under Forty-second street, to or near the Grand Central depot connecting with the Fourth Avenue improvement, and that according to the route and plans adopted by the petitioner it is necessary to build said railroad underground and in a tunnel, and that it is the intention of the petitioner so to build such railroad under the provisions of chapter 582 of the Laws of 1880; and it further appearing to the court that the consent of the owners of one-half in value of the property bounded on the line of such road, cannot be obtained. Now,

therefore, on motion of Tillotson & Kent, attorneys for the said petitioner, it is ordered that William G. Choate, John T. Agnew and James McLean be and they are hereby appointed commissioners to determine, after a hearing of all parties interested, whether such a railroad ought to be allowed to be built underneath said streets, roads and public places, or any of them, and in what manner the same may be so built with the least damage to the surface, and to the use of the surface by the public, according to the provisions of and with all the powers conferred by the said chapter 582 of the Laws of 1880.

And it is further ordered that said commissioners report their determination to this court with all convenient speed.

And it is further ordered that the first meeting of said commissioners be held at the general-term room at the court-house in the city of New York on the 10th day of February, 1883, at one o'clock in the afternoon of that day, and that at such meeting said commissioners appoint a time when and place where they will meet for the hearing by them of all parties interested, and that they cause notice thereof to be given by publishing daily (Sundays excepted) in the newspapers published in the city of New York called The Daily Register, New York Times, Daily Tribune, The New York Herald, The New York World, The Morning Journal, Truth, The Sun, " The Evening Post, The Mail & Express for one week prior to the time of such last-mentioned meeting, a notice that such commissioners will meet at a time and place therein specified to hear all parties interested in the matter as to whether or not such railroad shall be so built, and also by causing a copy of such notice to be left at each building fronting upon the streets and avenues through and under which such railroad is proposed to be built with a person of suitable age, at least one week previous to such meeting, and by serving a copy thereof upon the mayor of the city of New York at least one week previous to such meeting.

Ent.

N. D., *P. J.*

Exhibit C.

Rapid Transit Subway Construction Company.

Certificate of Incorporation.

We the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States, and at least one of us a resident of the State of New York, desiring to form a stock corporation pursuant to the provisions of the business corporations law, do hereby

Certify as follows:

I. The name of the proposed corporation is Rapid Transit Subway Construction Company.

II. The purpose or purposes for which it is formed are to construct, or aid in the construction and equipment of rapid-transit

railroads in the city of New York, authorized by chapter four of the laws of eighteen hundred and ninety-one, and its amendments, the putting the same in operation, and the use, maintenance
67 and operation thereof; also for the purpose of manufacturing, purchasing, selling and dealing in all materials and supplies useful in connection with the construction or operation of such rapid-transit railroads; also to purchase, hold and deal in the stock and bonds of any other corporation or corporations organized to construct or operate said railroads.

III. The amount of capital stock of the said corporation is six million dollars ($6,000,000) all of which shall be common stock.

IV. The number of shares of which the capital stock shall consist is sixty thousand (60,000) and the par value of each share is one hundred dollars ($100). The amount of capital with which the corporation will begin business is one million dollars ($1,000,000).

V. The principal business office of the corporation is to be located in the city of New York, county of New York, and State of New York

VI. Its duration is perpetual.

VII. The number of its directors is to be thirteen.

VIII. The names and post-office address of the directors for the first year are:

Names.	Post-office address.
William H. Baldwin, Jr..	120 Willow street borough of Brooklyn, city of New York.
Charles T. Barney.....	101 East 38th street, New York.
August Belmont	190 Madison Ave., N. Y.
George Coppell.....	40 Fifth Ave.
E. Mora Davison.....	148 East 36th St.
Andrew Freedman.....	617 5th Ave., N. Y.
James Jourdan.....	180 Remsen street, borough of Brooklyn, New York.
Gardiner M. Lane.....	Cambridge, Mass.
Walter Oakman.....	12 East 53rd street, New York.
John Pierce.....	434 Fifth avenue, New York.
William A. Read.....	4 East 62nd street, New York.
Cornelius Vanderbilt.....	608 Fifth Ave.
George W. Young.....	28 West 73d St.

68 IX. The directors shall at their first meeting after organization divide themselves by lot or otherwise as they may agree, into three classes the term of office of the first class to continue one year, of the second class to continue two years and of the third class to continue three years; but such classification shall be so made that at least one-fourth of the whole number of directors shall be elected annually. The board of directors may make by-laws appropriate to carry out the provisions, which by-laws shall bind the members of the corporation.

X. No transfer shall relieve any original subscriber to the stock of the company from his obligation to take and pay for the number of shares subscribed for by him in accordance with the terms of his subscription.

XI. The names and post-office addresses of the subscribers and a statement of the number of shares of stock which each agrees to take in the corporation are as follows:

Names.	Post-office addresses.	No. of shares.
Charles T. Barney	101 East 38th St., New York	100
August Belmont	190 Madison Ave., N. Y.	100
John B. McDonald	1 West 72nd St., N. Y.	100
Walter T. Oakman	12 East 53rd St., N. Y.	100
William A. Read	4 East 62nd St., N. Y.	100

In witness whereof we have made, signed, acknowledged and filed this certificate in duplicate, dated this 16th day of February, nineteen hundred.

CHARLES T. BARNEY.
AUGUST BELMONT.
JOHN B. McDONALD.
WATER T. OAKMAN.
WM. A. READ.

STATE OF NEW YORK, }
County of New York, } ss.:

On the 16th day of February, 1900, before me personally
69 came Charles T. Barney and on the 17th day of February in the year last aforesaid also before me personally came August Belmont, John B. McDonald, Walter T. Oakman and William A. Read, each to me known and known to me to be one of the individuals described in and who executed the foregoing instrument and each of whom to me acknowledged that he executed the same.

A. W. ANDREWS (34),
[NOTARIAL SEAL.] *Notary Public, N. Y. C.*

(Attached.)

Duplicate.

Treasurer's Office, State of New York.

$7,500.00. ALBANY, *Feb.* 19, 1900.

Received from Rapid Transit Subway Construction Company seventy-five hundred dollars, in full of tax of one-eighth of one per centum upon the capital stock of $6,000,000 of the above-named company for the privilege of organization pursuant to chapter 908, Laws of 1896.

ANDREW DAVIDSON.
Deputy Treasurer.

WILLIS E. MERRIMAN,
Grand Dep'ty Comptroller.

(Endorsed:) U. S. circuit court. Filed Jul- 9, 1901. John A. Shields, clerk.

70 Circuit Court of the United States, Southern District of New York.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and The Rapid Transit Underground Railroad Company, Complainants,

against

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Comptroller of the City of New York; Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith, Morris K. Jessup, Individually and as Members of the Pretended Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and The Rapid Transit Subway Construction Company, Defendants.

And now come the complainants The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company; and file and make the following amendment to their bill in equity heretofore filed herein on the 9th day of July, 1901; which amendment is to follow paragraph XXI in said bill and to precede the prayer for relief in said bill, which prayer for relief begins "Inasmuch, therefore, as your orators," &c.:

71 XXII. The said franchise which was acquired by the said Central Tunnel Railway Company and which is now owned by your orators is of the value of more than one million ($1,000,000) dollars. The profits of the said rapid-transit contract will exceed ten million ($10,000,000) dollars. The said franchise will be destroyed and made utterly valueless unless your orators obtain from this honorable court the writ of injunction hereinafter prayed for.

This suit arises under the Constitution and the laws of the United States and the matter in dispute herein exclusive of interest and costs exceeds the sum and value of two thousand ($2000) dollars.

JAMES M. FISK,
Solicitor for Complainants, 99 Nassau Street, New York.

ROGER FOSTER, *Of Counsel.*

(Endorsed:) U. S. circuit court—Filed Aug. 5, 1901—John A. Shields clerk.

72 United States Circuit Court, Southern District of New York.
In Equity.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and The Rapid Transit Underground Railroad Company, Complainants,

against

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Comptroller of the City of New York; Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith, Morris K. Jesup, Individually and as Members of the Pretended Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and Rapid Transit Subway Construction Company, Defendants.

The demurrer of The City of New York, Robert A. Van Wyck, individually and as mayor of the city of New York; Bird S. Coler, individually and as comptroller of the city of New York, defendants in the action entitled as above, to the bill of complaint of the above-named complainants, as amended by the amendments filed on the — day of August, 1901.

73 These defendants by protestation, not confessing or acknowledging any or all of the matters or things in said bill (as so amended) contained to be true in such manner and form as the same are therein set forth and alleged, do demur to said bill as so amended, and for cause of demurrer show:

First. That it appears on the face of the said bill that this court is without jurisdiction in the premises, in that the matter in dispute does not arise under the Constitution or laws of the United States.

Second. That it appears on the face of the said bill as so amended that all the parties to the suit are citizens of the State of New York, and that this suit does not involve any question arising under the Constitution or laws of the United States, and therefore this court has no jurisdiction in the premises.

Third. That the complainants have not in and by their said bill as so amended made or stated such a case as entitled them in a court of equity to any relief against these defendants as to the matters contained in said bill or any of such matters, and that said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainants any relief against these defendants.

Fourth. That the said bill as so amended is exhibited against these defendants and against several other defendants to the said bill for several distinct and independent matters and causes which have no relation to each other, and that said bill is altogether multifarious.

Fifth. That it appears in and by said bill as so amended that the alleged causes of action therein set forth are stale, and that so long a time has elapsed since the happening of the matters and things

therein alleged that it would be contrary to equity or good conscience to take cognizance thereof or to assume to enforce the same.

Sixth. That no case is stated in said bill as so amended authorizing the relief sought or any other relief.

Wherefore and for other divers good causes of demurrer appearing in said bill as so amended these defendants do demur thereto,
74 and humbly demand judgment of this court whether they shall be compelled to make any further or other answer to said bill, and pray to be hence dismissed, with their costs and charges in this behalf most wrongfully sustained.

New York, August 30, 1901.

THE CITY OF NEW YORK.
ROBERT A. VAN WYCK,
Individually and as Mayor of the City of New York.
BIRD S. COLER,
Individually and as Comptroller of the City of New York,
By JOHN WHALEN,
Corporation Counsel, Solicitor, 2 Tryon Row, New York City, N. Y.

I, the undersigned, counsel for the City of New York, Robert A. Van Wyck, individually and as mayor of the city of New York, and Bird S. Coler, individually and as comptroller of the city of New York, defendants in the above-entitled case do hereby certify that the foregoing demurrer is, in my opinion well founded in point of law.

JOHN WHALEN.

SOUTHERN DISTRICT OF NEW YORK, } ss:
County of New York, }

Bird S. Coler, being duly sworn, deposes and says, that he is one of the defendants for whom this demurrer is interposed; that the demurrer of these defendants to the bill of complaint in the above-entitled case is not interposed for delay.

BIRD S. COLER.

Sworn to and subscribed before me this 30th day of August, 1901.

R. E. SELMES,
Notary Public, Kings Co.

Certificate filed — N. Y. Co.

(Endorsed:) U. S. circuit court Filed Aug. 30, 1901 John A. Shields, clerk.

75 United States Circuit Court for the Southern District of New York.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and The Rapid Transit Underground Railroad Company, Complainants,

vs.

ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Comptroller of the City of New York; Alexander E. Orr (Sued as Albert E. Orr), John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (Sued as Charles L. Smith), Morris K. Jesup, Individually and as Members of the Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, The Rapid Transit Subway Construction Company, and The City of New York, Defendants.

The demurrer of the defendants, Alexander E. Orr, sued as Albert E. Orr; John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith, sued as Charles L. Smith, and Morris K. Jesup, individually and as members of the board of rapid-transit railroad commissioners for the city of New York, to the bill of complaint of the above-named complainants, as amended by the amendments filed on the 5th day of August, 1901.

76 These defendants by protestation, not confessing or acknowledging any or all of the matters or things in said bill (as so amended) contained to be true in such manner and form as the same are therein set forth and alleged, do demur to said bill as so amended, and for cause of demurrer show:

First. That it appears on the face of the said bill that this court is without jurisdiction in the premises, in that the matter in dispute does not arise under the Constitution or laws of the United States.

Second. That it appears on the face of the said bill that all the parties to the suit are citizens of the State of New York, and that this suit does not involve any question arising under the Constitution or laws of the United States, and therefore this court has no jurisdiction in the premises.

Third. That the complainants have not in and by their said bill made or stated such a case as entitled them in a court of equity to any relief against these defendants, as to the matters contained in said bill or any of such matters, and that said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainants any relief against these defendants.

Fourth. That the said bill is exhibited against these defendants and against several other defendants to the said bill for several distinct and independent matters and causes which have no relation to each other, and that said bill is altogether multifarious.

Fifth. That it appears in and by the said bill that the alleged causes of action therein set forth are stale, and that so long a time has elapsed since the happening of the matters and things therein

alleged that it would be contrary to equity or good conscience to take cognizance thereof or to assume to enforce the same.

Sixth. That no case is stated in said bill authorizing the relief sought or any other relief.

Wherefore, and for other divers good causes of demurrer appearing in said bill, these defendants do demur thereto, and humbly demand judgment of this court, whether they shall be com-
77 *pelled to make any further or other* answer to said bill, and pray to be hence dismissed, with their costs and charges in this behalf most wrongfully sustained.

New York, August 28th, 1901.

PARSONS, SHEPARD & OGDEN,
Solicitors for Defendants Alexander E. Orr and Others,
111 *Broadway, Borough of Manhattan,*
City of New York.

BOARDMAN, PLATT & SOLEY,
Solicitors for Defendants Alexander E. Orr and Others,
35 *Wall Street, Borough of Manhattan,*
City of New York.

SOUTHERN DISTRICT OF NEW YORK, } ss:
County of New York, }

Alexander E. Orr, being duly sworn, deposes and says that he is one of the above-named defendants; that the foregoing demurrer of the said defendants to the bill of complaint as amended in the above-entitled case, is not interposed for delay.

A. E. ORR.

Sworn to and subscribed before me, this 28th day *day* of August, 1901.

ROB'T H. HUTCHINS,
[NOTARIAL SEAL.] *Notary Public, N. Y. Co.*

I, the undersigned, counsel for the defendants, Alexander E. Orr, sued as Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith, sued as Charles L. Smith and Morris K. Jesup, individually and as members of the board of rapid-transit railroad commissioners for the city of New York, in the above-entitled case, do hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

EDWARD M. SHEPARD.

(Endorsed:) U.S. circuit court, Filed Sep. 2, 1901—John A. Shields clerk.

78 United States Circuit Court, Southern District of New York
In Equity.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and The Rapid Transit Underground Railroad Company, Complainants,

vs.

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Comptroller of the City of New York; Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith, Morris K. Jesup, Individually and as Members of the Pretended Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and Rapid Transit Subway Construction Company, Defendants.

The demurrer of John B. McDonald, one of the above-named defendants, to the bill of complaint of the above-named complainants, as amended by the amendments filed on the fifth day of August, 1901.

This defendant by protestation, not confessing or acknowledging any or all of the matters or things in said bill (as so amended) contained to be true in such manner and form as the same are
79 therein set forth and alleged, doth demur to said bill as so amended, and for cause of demurrer showeth:

First. That it appears on the face of the said bill that this court is without jurisdiction in the premises, in that the matter in dispute does not arise under the Constitution or laws of the United States.

Second. That it appears on the face of the said bill as so amended that all the parties to the suit are citizens of the State of New York, and that this suit does not involve any question arising under the Constitution or laws of the United States, and therefore this court has no jurisdiction in the premises.

Third. That the complainants have not in and by their said bill as so amended made or stated such a case as entitles them in a court of equity to any relief against this defendant as to the matters contained in said bill or any of such matters, and that said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainants any relief against this defendant.

Fourth. That the said bill as so amended is exhibited against this defendant and against several other defendants to the said bill for several distinct and independent matters and causes which have no relation to each other, and that said bill is altogether multifarious.

Fifth. That it appears in and by the said bill as so amended that the alleged causes of action therein set forth are stale, and that so long a time has elapsed since the happening of the matters and things therein alleged that it would be contrary to equity or good conscience to take cognizance thereof or to assume to enforce the same.

Sixth. That no case is stated in said bill as so amended authorizing the relief sought or any other relief.

80 Wherefore, and for other divers good causes of demurrer appearing in said bill as so amended, this defendant doth demur thereto, and humbly demands judgment of this court whether it shall be compelled to make any further or other answer to said bill, and prays to be hence dismissed, with its costs and charges in this behalf most wrongfully sustained.

New York, August 1, 1901.

JOHN B. McDONALD,
By NICOLL, ANABLE & LINDSAY,
Solicitors, 31 *Nassau Street, New York.*

I, the undersigned, counsel for John B. McDonald, one of the defendants in the above-entitled case, do hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

DE LANCEY NICOLL.

SOUTHERN DISTRICT OF NEW YORK, } ss:
County of Westchester, }

John B. McDonald, being duly sworn, deposes and says; that he is one of the above-named defendants; that the foregoing demurrer of the said defendant to the bill of complaint in the above-entitled case is not interposed for delay.

JOHN B. McDONALD.

Sworn to and subscribed before me this 31st day of August, 1901.

BERNHARD BARUCH,
[SEAL.] *Notary Public, Westchester County.*

81 STATE OF NEW YORK, } ss:
County of Westchester, }

I, Leverett F. Crumb, clerk of the county of Westchester, and also clerk of the supreme court for the said county, the same being a court of record, do hereby certify that Bernhard Baruch before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of Westchester county, dwelling in said county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 31st day of August, 1901.

[SEAL.] LEVERETT F. CRUMB, *Clerk.*

(Endorsed:) U. S. circuit court Filed Sep. 2, 1902 John A. Shields clerk.

82 United States Circuit Court, Southern District of New York.
In Equity.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and The Rapid Transit Underground Railroad Company, Complainants,

vs.

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Comptroller of the City of New York; Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith, Morris K. Jesup, Individually and as Members of the Pretended Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and Rapid Transit Subway Construction Company, Defendants.

The demurrer of Rapid Transit Subway Construction Company, one of the above-named defendants, to the bill of complaint of the above-named complainants, as amended by the amendments filed on the 5th day of August, 1901.

83 This defendant by protestation, not confessing or acknowledging any or all of the matters or things in said bill (as so amended) contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to said bill as so amended, and for cause of demurrer showeth:

First. That it appears on the face of the said bill that this court is without jurisdiction in the premises, in that the matter in dispute does not arise under the Constitution or laws of the United States.

Second. That it appears on the face of the said bill as so amended that all the parties to the suit are citizens of the State of New York, and that this suit does not involve any question arising under the Constitution or laws of the United States, and therefore this court has no jurisdiction in the premises.

Third. That the complainants have not in and by their said bill as so amended made or stated such a case as entitled them in a court of equity to any relief against this defendant as to the matters contained in said bill or any of such matters, and that said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainants any relief against this defendant.

Fourth. That the said bill as so amended is exhibited against this defendant and against several other defendants to the said bill for several distinct and independent matters and causes which have no relation to each other, and that said bill is altogether multifarious.

Fifth. That it appears in and by the said bill as so amended that the alleged causes of action therein set forth are stale, and that so long a time has elapsed since the happening of the matters and things therein alleged that it would be contrary to equity or good conscience to take cognizance thereof or to assume to enforce the same.

84 Sixth. That no case is stated in said bill as so amended authorizing the relief sought or any other relief.

Wherefore, and for other divers good causes of demurrer appearing in said bill as so amended this defendant doth demur thereto, and humbly demands judgment of this court whether it shall be compelled to make any further or other answer to said bill, and prays to be hence dismissed, with its costs and charges in this behalf most wrongfully sustained.

New York, August 30th, 1901.

RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY,
By STRONG & CADWALADER,
Solicitors, 40 Wall Street, New York.

I, the undersigned, counsel for The Rapid Transit Subway Construction Company, one of the defendants in the above-entitled case, do hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

GEO. W. WICKERSHAM.

SOUTHERN DISTRICT OF NEW YORK, } ss.:
County of New York, }

Frederick Evans, being duly sworn, deposes and says that he is the secretary of The Rapid Transit Subway Construction Company, the above-named defendant; that the foregoing demurrer of the said defendant to the bill of complaint in the above-entitled case, is not interposed for delay.

FREDERICK EVANS.

Sworn to and subscribed before me, this 30th day of August, 1901.

EDWARD DONAHOE,
[SEAL.] *Notary Public, N. Y. County.*

(Endorsed:) U. S. circuit court. Filed Aug. 30, 1902. John A. Shields, clerk.

85 Circuit Court of the United States for the Southern District of New York.

THE UNDERGROUND RAILROAD OF THE CITY OF New York and The Rapid Transit Underground Railroad Company, Complainants,
against
THE CITY OF NEW YORK, ROBERT A. VAN Wyck, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Comptroller of the City of New York; Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith, and Morris K. Jessup, Individually and as Members of the Pretended Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and The Rapid Transit Subway Construction Company, Defendants.

In Equity. Nos. 89 and 90.

James M. Fisk, for complainants.
Roger Foster, of counsel.
Strong & Cadwalader, for Rapid Transit Subway Construction Company.
George W. Wickersham, Esq., for defendants.
Nicoll, Anable & Lindsay, for John B. McDonald.
Boardman, Platt & Soley.
Parsons, Shepard & Ogden, for defendants, Alexander E. Orr *et al.*
Edward M. Shepard, of counsel.

HAZEL, *D. J.:*

By this suit the complainants, domestic corporations organized under the laws of the State of New York, seek relief from alleged unauthorized acts of the defendants, The City of New York, certain municipal officers, rapid transit commissioners and contractors engaged in the construction of an underground railway, and subway in the city of New York. For the purpose of convenience and brevity, the defendants are hereafter designated as municipal
86 authorities, commissioners and contractors. The bill in form seeks to enjoin municipal officers and commissioners from issuing bonds of the city of New York to pay for the work done in the construction of the subway or underground railway now in course of completion, from paying any money to the contractors under color of authority of the rapid-transit act, so called, chapter 4, Laws 1891, as subsequently amended, and to restrain the contractors from continuing the construction of the road upon the route specified on maps filed by complainants and their predecessors. The defendants demur separately to the bill of complaint on the ground, first, that the subject-matter in dispute does not arise under the Constitution and laws of the United States, and, therefore, the court is without jurisdiction; second, that the court is also without jurisdiction because of the citizenship of the parties; third, want of equity ap-

pearing on the face of the bill; fourth, multifariousness and laches. The demurrants admit the following facts, to wit: The Central Tunnel Railway Company was organized on March 26, 1881, under the general railroad law of the State of New York (L. 1850, chap. 140; L. 1880, chap. 520), for the purpose of constructing and maintaining a railroad for the use of the public in the conveyance of persons in the city of New York. The articles of association specifically state the length of the railroad and the streets to and under which it was intended to construct said road. On March 28, 1882, a map and profile of the route adopted was filed as required by law. This company failed to obtain the consent of the municipal authorities and of the necessary property-owners, and, therefore,
87 on February 2, 1883, an application was made in its behalf to the general term of the supreme court for the first department, for the appointment of commissioners, pursuant to the tunnel law of 1880, chapter 582, to determine whether and in what manner such railroad ought to be built. Commissioners were appointed. Two vacancies in the commission occurred by resignation and declination to act. Other commissioners were appointed, one of whom also declined. Another application was made to the court to fill such vacancy, which application, however, was never granted. It does not appear when the last application was made but it may be assumed from the general allegations of the bill that it was very soon after the appointment of the commissioners following the first application, Neither the general term nor its successor, the appellate division of the supreme court, first department, has ever acted upon the latter application. No renewal of such application has been made to the appellate division, and nothing further was done by this corporation or its successors towards the appointment of commissioners. The New York and New Jersey Tunnel Railway Company and the Terminal Underground Railway Company were organized on January 2, 1883, and March 25, 1886, respectively, under the general railroad law of 1850, as amended by chapter 582 of the Laws of 1880. Subsequently on August 21, 1896, these three railroad companies were merged and consolidated into The Underground Railroad of the City of New York, one of complainants, which was organized and incorporated on October 2, 1896. The latter corporation paid a per-
88 centage tax of $181.00 on its capital stock, as required by law upon filing its certificate of incorporation. A map and profile of its route were duly filed June 10, 1897, and it is claimed that it succeeded to all the rights and privileges of its predecessors. The complainant, Rapid Transit Underground Railroad Company was incorporated on April 9, 1897, pursuant to chapter 39 of the General Laws, to construct an underground railway in the city of New York. On October 11, 1897, it filed a map and profile of the route over and under which it was intended to operate. On April 29, 1897, this corporation, which is a tax-payer, entered into an agreement with the underground railroad by which it obtained a leasehold right to the rights and franchises of the underground railroad. The bill avers broadly that by these proceedings, the Rapid Transit Underground railway acquired the exclusive

franchises to build and operate a railroad and tunnel over the route described by the map and profiles theretofore filed. By an act of the legislature, passed in 1891, amended by chapter 752, Laws of 1894, and already mentioned as the rapid-transit act, it is provided that a board of rapid-transit railroad commissioners shall be created, who among other things are empowered to fill vacancies among their number and to construct an underground railroad in the city of New York, provided the qualified electors of that city shall favor such construction. The act further empowers the commissioners to determine the route and general plan of construction, and provides that their plans and conclusions shall be submitted to the common council for its consent and approval; that in case consents of the property-owners along the line of
89 route upon which the approval of the municipal authorities had been given, cannot be obtained, an application shall be made by the commissioners to the appellate division of the supreme court for authority to construct along the proposed route. Such an application was made and authority obtained. Subsequently on February 24, 1900, the defendants The City of New York, municipal authorities and commissioners, entered into a contract with the defendants, contractors, to construct a road over the route described by the maps and profiles theretofore filed by the complainants and their predecessors. The bill which is very lengthy then proceeds to recite in detail the proceedings by which defendants claim to obtain the right to construct an underground railroad in the city of New York pursuant to the authority of the rapid-transit act. It is averred that the rapid-transit act is an infringement of the fourteenth amendment to the Constitution of the United States because it takes the property of the complainants for private use without due process of law, and is, therefore, unconstitutional. It is also averred in the bill that the determination of the commissioners appointed under the rapid-transit act to construct an underground railroad upon the routes over which it is claimed complainants have the right to construct a road, together with the consent of the local authorities and the action of the appellate division of the supreme court, in lieu of the consent of property-owners bounded upon such route, in effect gave consent to complainants to construct such road, and the legal effect of such acts must be construed
90 as a confirmation of complainant's franchise rights and inure wholly to their benefit.

Does the bill disclose from the foregoing statement of facts a cause of action which is cognizable by this tribunal? All parties are residents of the State of New York. To give the court jurisdiction there must, therefore, be involved a Federal question besides the necessary jurisdictional amount. How does the Federal question arise? Have the complainants by virtue of the various acts of incorporation set forth in the bill together with the steps which have been taken by their predecessors, as well as themselves, acquired any rights as against the defendants which bring them within the protection of the Federal Constitution or other national enactments? How could such privileges and immunities accrue to

the complainants as would entitle them here to equitable relief? Clearly, the complainants must be vested with some contract rights which have been impaired by legislative action on the part of the State of New York, thus bringing them within the protection of article 10, section 1, of the Federal Constitution, or they must have been deprived by the State of New York of some property right without due process of law, or be denied equal protection of the laws, and, therefore, may invoke the fourteenth amendment of the Constitution to their assistance. As was said in New Orleans *v.* N. O. Water Works Co. 142 U. S. 88,

"Before we can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment, and some ground to believe that it has been impaired; and that to constitute a violation
91 of the provision against depriving any person of his property without due process of law, it should appear that such person has a property in the particular thing of which he is alleged to have been deprived."

The complainants cannot by mere allegation that such questions are before the court for decision vest the court with jurisdiction over a controversy when it clearly appears that no Federal question is involved. McCain *v.* Des Moines, 174 U. S. 168. Complainants claim that by statutory enactment they obtained an exclusive franchise to construct an underground railroad and that fixed and positive contractual relations were established which have been impaired by subsequent legislative and corporate action; that there is danger that complainants will be deprived of vested property rights without due process of law. When a question arising under the Constitution or laws of the United States is necessarily involved, the jurisdiction of the Federal courts may be properly invoked to redress the wrong and afford such reparable aid as equity and good conscience require. The averments of the bill are framed to that end. No citation of authorities is needed declarative of the principle that a franchise right obtained from a sovereign power for the purpose of constructing a railroad or to acquire lands for use by a corporation for the purpose for which it is created is property or its equivalent, a grant of privileges or immunities. Such property rights when obtained may be exercised undisturbed or may be converted into tangible benefits at the option of the owner. The object and purpose attained by the formation of an association often leads to liberal concessions by the sovereignty from motives of
92 public policy. It is presumed that the general public will receive substantial benefits by the State's munificence. From the very nature of the contemplated project the public is expected to receive the benefit either in health, convenience or welfare and the gratuitous generosity of the sovereign power is invoked to encourage the exploitation of vast commercial enterprises for the general good. It must follow that any legislative grant or procurement within the scope and power of the legislative authority when consummated becomes authoratatively a vested property right. The State after the contract is completed may do no act in restraint or

impairment of the contract rights and immunities which it gave. To restrict, vary or violate any such contractual rights and obligations which may have arisen is forbidden, as we have already seen, by section 10, subdivision 1, of the Constitution of the United States, which prohibits the enactment of any law by a State impairing the obligations of contracts. Adirondack R'y *v.* N. Y. State, 176 U. S. 335. The fourteenth amendment forbids a State to deprive any person of life, liberty or property without due process of law. Are any property rights shown by the bill to have been improperly divested from complainant without respect to this constitutional provision? It must be ascertained at the outset whether the complainants obtained any vested property rights pursuant to a legal contract with the State. If contractual obligations became vested by the completed acts of the parties, their subsequent impairment by the respondent may be shown as a basis for claiming jurisdiction in the Federal courts. Cooley Cons. Limitations, p. 54.

93 It is contended for the demurrants that the allegations of the bill clearly show that the complainants had no contract with the State whatever which has been or could be impaired by the acts complained of. I have carefully examined the authorities upon which complainants rely to establish the existence of such contractual relations between it and the State and as a result thereof, I am of opinion that the demurrant's contention must prevail. It is based on sound logic, good sense and substantive law. The incorporation of the Central Tunnel Railway Company, a predecessor of complainant, under General Laws of 1850, was authorized by the constitution of the State of New York, which vested the State legislature with power to pass general laws for the formation of corporations to construct street railroads. The provision of the constitution authorizes the legislature to enact general laws for the formation of corporations to lay down railroad tracks upon the condition, among others, that the consent of the local authorities be first obtained. In the case of People *v.* O'Brien, 111 N. Y., p. 30, Chief Justice Ruger says,

"This right under the constitution, could be acquired only from the city authorities, and they could grant or refuse it at their pleasure. The constitution not only made the consent of the municipal authorities indispensable to the creation of such a right, but, by implication, conferred authority upon them to grant the consent, upon such terms and conditions as they chose to impose, and upon the corporation the right to acquire it by purchase."

94 The constitution of the State further provided that when the required consents of property-owners cannot be obtained, the general term of the supreme court might upon application appoint three commissioners who shall determine after hearing of all parties interested whether such road ought to be constructed. This right under the constitution, therefore, could only be acquired by strictly complying with the provisions referred to. No greater right was imparted to the corporation by its articles of association, and subsequent filing of maps and profiles than the permissive right to obtain consents of property-owners and of the municipality affected. To affect a substantive contract between the State and a

corporation organized for the purpose of constructing a railroad requires a meeting of minds of the interested and essential parties of the contract. The constitution and the statutes of the State in unequivocal language have indicated who must be regarded as interested in such contractual obligations. The mere act of filing maps and profiles creates no lien in favor of a street surface railway as against the owner of adjacent property,—at least not until the legal authorities whose consent is essential have signified their complete acquiescence and assent to the construction of the railroad. Filing of maps is simply notice of intention as to the route and property which the road proposes to take. People *v.* Adirondack R'y, 160 N. Y. 225. In the case at bar, the attempt to obtain the consents of owners of property along the proposed route, as well as the assent of the municipal authorities was ineffectual. This, I think, must be regarded as equivalent to a refusal by the authorities to bargain or to assent to the immunities and property rights which
95 otherwise would have been acquired. The consent of the municipal authorities and the approval by the appellate division of the determination of the commissioners to construct a road pursuant to the rapid-transit act, cannot inure to the benefit of complainants. It was decided by the general term of the supreme court, first department, in the matter of N. Y. District Railway Company, 42 Hun. 621, that section 1, chapter 582, Laws 1880, amendment to the Laws of 1850, which provided that the determination of commissioners confirmed by the court may be taken in lieu of the consent both of municipal authorities and property-owners, is unconstitutional; that the consent of the municipality must be obtained in any event. This case was affirmed by the State court of appeals, 107 N. Y. 42. This decision leads to the conclusion that because of it and for no other reason, the general term failed to act upon the application of complainants' predecessor that the vacancy upon the commission theretofore appointed, be filled by the court. The complainants cannot, therefore, claim that any rights remain to them because of delay caused by inaction of judicial authority. Neither the complainants nor their predecessors had obtained either the consent of the municipal authorities or of property-owners abutting upon the line of route. The consents required by the constitution and laws of the State are conditions precedent to a valid contract and no right of franchise or immunities may be granted or obtained until such conditions are complied with. Filing of plans and profiles by any of the complainants or their predecessors resulted in the acquisition of no vested rights that could be
96 impaired by the acts admitted by the demurrers. Complainants had merely taken preliminary steps in the effort to obtain such vested rights. Matter of application of R. E. R. Co. 123 N. Y. 351; *In re* Thirty-fourth St. R. R. Co. 343. The language of Justice Gray in the opinion of the court rendered in the case first cited, may with propriety be applied. He says,

"Sufficient vitality and strength to go on with and to construct a railroad do not exist in the newly formed corporation, until infused by the consents of the local authorities and property-owners. Until

that moment, when the company can assert that the statutory conditions of its right to be and to do are fulfilled, it cannot strictly, nor justly, be said that it is in a position legally to deprive the landowner of his property. By organization under the act it has become a corporation, but with no authority as yet to construct and operate a railroad upon a street or highway. Its right to the exercise of that franchise is still inchoate and does not become a vested right, until after the consents specified by the statute have been obtained. It may be a corporation, but it has no power to take a step in the direction of occupying the street or highway, because it is, in effect, inhibited by the condition of its charter from doing so, while the consents to the appropriation of the street or highway to railroad uses are lacking."

In the latter case the right of the railroad company was subject to three precedent conditions. First, the consent of the local authorities; second, consent of property-owners or in lieu thereof
97 the determination and approval of the commissioners in its favor; third, the consent of the companies having coincident routes. The court held that these conditions must be performed before any right to proceed with the construction of the road could be exercised. It is, therefore, clear that the municipal authorities have the determining power to grant the right to tear up the streets and to take the property of the city for the construction of a street railroad. The choice of responsible parties is with the municipality. Obviously in no sense can the consents of municipal authorities obtained under the rapid-transit act of 1891, and amendments of 1894, inure to complainants' benefit. The authorities cited by counsel for complainants do not apply. They refer for most part to railroads constructed without the limits of a municipality, and where the preliminary steps to secure vested rights differ from those required in a case like the present. He asserts with great zeal and earnestness that complainants and their predecessors in good faith filed maps and profiles, necessarily expended $100,000.00 towards the construction of the road, and applied to the general term for the appointment of commissioners, and having begun construction of the road thereby upon the subsequent consent of the municipal authorities under the rapid-transit act acquired vested property rights; that in legal effect such action was a consummation of complainants' contract. I am unable to subscribe to that theory. It is a fallacious assertion in the light of the statutes of the State and of the authorities construing them. The determination of the commissioners appointed under the rapid-transit act, and
98 the rights acquired by individuals thereunder, can in no manner be viewed as an act in completion of what complainants' predecessors undertook to accomplish twenty years prior to that determination and failed. The application to the general term for the appointment of commissioners on February 2, 1883, was without force. It was prematurely made. None of the conditions, as we have seen, upon which the right to apply was based had been performed. The consent of the local authorities which was an essential element, could not be shown upon the application. People

ex rel. N. Y. U. R'y Co. *v.* Newton, 58 Super. Ct. 439; Matter of Petition of Long Island Railroad Co. 45 N. Y. 364; Schaper *v.* B. & L. S. C. R'y Co. 4 State Rep. 860; Matter of Application of Rochester Electric R'y Co. 123 N. Y. 351; Suburban Rapid Transit Co. *v.* The Mayor, 128 N. Y. 510. Moreover the rights of complainants' predecessors obtained by their charters lapsed and were abrogated by their failure to comply with the provisions of section 47 of the act of 1850, as amended by chap. 775 of the Laws of 1867. Such failure has uniformly been held to operate as a self-executory forfeiture of the charter of a corporation. *In re* B. W. & N. Rd. Co. 72 N. Y. 245; Brooklyn Steam Transit Co. *v.* City of Brooklyn, 78 N. Y. 524. These cases seem to be authoritative of the abandonment of the project by the companies which had obtained the permissive right to construct an underground railroad. No contract with the State has been established which is threatened with impairment. Never having had a franchise, — never having availed themselves of any permissive rights flowing from their incorporation,
99 they cannot now be heard to complain. The permissive right of complainant, Rapid Transit Underground Railway Company, which as already stated was incorporated April 9, 1897, to construct an underground road in the city of New York has not expired. The acts of defendants, commissioners under the rapid-transit act, cannot be construed to confer upon complainant any right or authority to construct an underground railroad specifically mentioned in the act. By the provisions of the rapid-transit act, the privilege and franchise is to be sold at public auction to a corporation organized and existing under that act. The averred unconstitutionality of the rapid-transit act and the invalidity of the contract entered into by the defendants for the many reasons assigned in the bill seems to be sufficiently answered by the decision of the court of appeals of the State of New York in The Sun Publishing Co., *v.* Mayor, &c., 152 N. Y., 257. The constitutionality of the rapid-transit act is there established. The decision being that of the highest tribunal of the State is controlling upon this court. Adams Express Co. *v.* Ohio, 165 U. S. 219. It falls within the general rule that the construction of the State courts of last resort, of State constitutions, and statutes, will ordinarily be accepted by the courts of the United States as controlling. Innumerable reasons are assigned by the bill to show that the municipality and the commissioners improperly contracted for the construction of the road. Their good faith is attacked. None of these reasons, however, justify Federal interference by virtue of the fourteenth amendment to
100 the Constitution. French *v.* Barber Asphalt Co. 101 U. S. 324. A tax of one-eighth per cent. upon the amount of capital required upon organization (L. 1886, chap. 143, as amended by L. 1892, chap. 668), can have no bearing upon the question at issue. That was a tax for the privilege of organizing a corporation for purposes specified in its charter. Payment of the tax can be given no other effect.

A further point is made by complainants that the unconstitutionality of the rapid-transit act is attested by reason of provisions which

are claimed to be a denial to the complainant of the equal protection of the laws. (U. S. Cons. 14th amendment.) The rapid-transit act does not arbitrarily authorize the commissioners to contract with the contractors to the exclusion of others. As before stated the act in terms authorizes the rapid-transit board to contract

"With any person, firm or corporation which in the opinion of the board shall be best qualified to fulfil and carry out such contract, for the construction of such road or roads upon the routes and in accordance with the plans and specifications so adopted, for such sum or sums of money, to be raised and paid out of the treasury of said city, as hereinafter provided, and on such terms and conditions not inconsistent with the aforesaid plans and specifications as said board shall determine to be best for the public interest." (Sec. 34.)

No particular person, class of persons or corporation, is excluded from the privilege of contracting for the construction and
101 operation of the proposed railroad. All may compete. Therefore, the State has not denied to complainant the equal protection of the laws under the fourteenth amendment. Pacific Rd. Removal Cases, 115 U. S. 321; Tinsley *v.* Anderson, 171 U. S. 101. Other more extended discussion of questions presented would serve no beneficial purpose. In the view taken no Federal question is involved which entitles the complainants to redress in the courts of the United States. The demurrers of the defendants on the ground of want of jurisdiction are sustained. The complaint is dismissed with costs.

(Endorsed:) Circuit court of the United States for the southern district of New York, in equity, Nos. 89 and 90.—The Underground Railroad of the City of New York & *1*, complainants, *vs.* The City of New York, *et al.* defendants.—Opinion.—Hazel, D. J.—U. S. circuit court, southern district of New York, Filed Jun- 19, 1902, John A. Shields, clerk.

102 At a term of the circuit court of the United States for the southern district of New York, held at the court-rooms of said court in the United States court-house and post-office building in the county of New York, on the 18th day of August, 1902.

Present: Hon. John R. Hazel, district judge.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW York and The Rapid Transit Underground Railroad Company, Complainants,
against
THE CITY OF NEW YORK, ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Comptroller of the City of New York; Alexander E. Orr (Sued as Albert E. Orr), John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (Sued as Charles L. Smith), Morris K. Jesup, Individually and as Members of the Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and Rapid Transit Subway Construction Company, Defendants. } In Equity.

This cause came on to be heard at this term and was argued by counsel and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that the demurrers of the defendants separately interposed to the bill of complaint as amended, be, and they are, and each of them hereby is, sustained, and that said bill of complaint as amended be, and the same hereby is,
103 dismissed for want of jurisdiction upon the ground that this court has no jurisdiction of the same.

[SEAL.] JOHN R. HAZEL, *U. S. J.*

(Endorsed:) Circuit court of the U. S., southern dist. of New York. The Underground Railroad of the City of New York and ano., against The City of New York, *et al.* In equity.—Decree.—Parsons, Shepard & Ogden, solicitors for Board of Rapid Transit Railroad Commissioners, 111 Broadway, N. Y. city.—James M. Fish, sol'r for complainants.—U. S. circuit court, southern district of New York. Filed Aug. 19, 1902, John A. Shields, clerk.

104 Circuit Court of the United States for the Southern District of New York.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and The Rapid Transit Underground Railroad Company, Complainants,
against
THE CITY OF NEW YORK, ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; *Bird* S. Coler, Individually and as Controller of the City of New York; Alexander E. Orr (Sued as Albert E. Orr), John H. Starin, Woodbury Langdom, George L. Rives, Charles S. Smith (Sued as Charles L. Smith), Morris K. Jesup, Individually and as Members of the Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and Rapid Transit Subway Construction Company, Defendants. } In Equity.

The circuit court of the United States for the southern district of New York hereby certifies to the Supreme Court of the United States that on the 19th day of August, 1902, a decree was entered in the above-entitled suit in equity pursuant to the decision of the said court sustaining the demurrers of the defendants separately interposed to the bill of complaint as amended and dismissing said bill of complaint as amended for want of jurisdiction of the same; a copy of which amended bill *and* equity and demurrers is contained in the record of this suit, to which reference is had for a more particular description thereof.

And this court further certifies that in said suit the juris-
105 diction of this court is in issue; and further certifies to the Supreme Court of the United States said question of jurisdiction raised by said demurrers to said amended bill in equity as follows:

(1.) When a circuit court of the United States decides that the complainant to a bill of equity brought to enforce an alleged right which he claims arises under the Constitution of the United States shows no right arising under the Constitution of the United States, has said court jurisdiction to decide and hear and determine other matters of equitable cognizance pleaded in said bill, which do not arise under either the Constitution of the United States or a statute, or a treaty thereof; if the complainant and defendant are citizens of the same State?

(2.) Has this court jurisdiction of the said amended bill in equity?

Dated New York, September 12th, 1902.

JOHN R. HAZEL,
United States Judge.

[SEAL OF U. S. C. C., S. D. N. Y.]

106 Circuit Court of the United States, Southern District of New York.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and The Rapid Transit Underground Railroad Company, Complainants,

against

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Controller of the City of New York; Alexander E. Orr (Sued as Albert E. Orr), John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (Sued as Charles L. Smith), Morris K. Jesup, Individually and as Members of the Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and The Rapid Transit Subway Construction Company, Defendants.

The above-named complainants The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company, conceiving themselves aggrieved by the decree entered August 19th 1902, in the above-entitled proceedings, do hereby appeal from said decree to the Supreme Court of the United States, and they pray that this their appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

ROGER FOSTER,

Solicitor for Complainants and Appellants, The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company, 35 Wall Street, New York.

New York, September, 1902.

And now to wit, on Oct. 1st, 1902; it is ordered that the appeal be allowed as prayed for.

E. H. LACOMBE, *U. S. C. J.*

107 Circuit Court of the United States, Southern District of New York.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and The Rapid Transit Underground Railroad Company, Complainants,

against

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Controller of the City of New York; Alexander E. Orr (Sued as Albert E. Orr), John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (Sued as Charles L. Smith), Morris K. Jesup, Individually and as Members of the Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and The Rapid Transit Subway Construction Company, Defendants.

To the Honorable E. Henry Lacombe, United States circuit judge:

The petition of the Underground Railroad of the City of New York and the Rapid Transit Underground Railroad Company respectfully shows as follows:

I. Heretofore and on or about the 9th day of July 1901, your petitioners The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company duly filed in the circuit court of the United States for the southern district of New York a bill of complaint against the above-named defendants.

II. Subsequently and on or about the 4th day of September, 1901, demurrers to said bill of complaint as amended were separately filed on behalf of defendants therein; and on or about the 18th day of August, 1902, a decree was signed by the Honorable John R.
108 Hazel a district judge of the United States and filed in the clerk's office of this honorable court, which decree sustained said demurrers and dismissed said bill as amended for want of jurisdiction; and on or about the 12th day of September, 1902, by a certificate duly made and signed by said district judge this honorable court duly certified to the Supreme Court of the United States that in this cause the jurisdiction of this court was in issue and further certified said question of jurisdiction.

III. Your petitioners conceive themselves to be grieved by the said decree herein in favor of these defendants and against these complainants in which decree and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of the complainants herein all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore your petitioners pray that an appeal may issue in their behalf to the United States circuit court for the southern district of New York for the correction of the errors so complained of, and that a transcript of this cause, duly authenticated may be sent to the Supreme Court of the United States; and that your petitioners may

have such other and further relief in the premises as may be just; your petitioners will ever pray &c.

Dated New York, September 29, 1902.

THE UNDERGROUND RAILROAD OF THE CITY — N. Y.,
By JAMES M. FISK, *Sol'r.*
THE RAPID TRANSIT UNDERGROUND,
By JAMES M. FISK, *Its Sol'r.*

109 (Endorsed:) Circuit court of the United States, southern district of New York.—The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company, complainant-, against The City of New York, Robert A. Van Wyck, *et al.* defendants.—Petition and allowance of appeal.—James M. Fisk, complainants' solicitor, 99 Nassau St. New York.—Copy received, Oct. 2, 1902, Strong & Cadwalader att'ys for Rapid Transit.—Copy received Oct. 2, 1902, Boardman, Platt & Soley, per J. T. C.—A copy of the within paper has been this day received at the office of the corporation counsel, Oct. 2, 1902, George L. Rives, corporation counsel.—A copy of the within has this day been received, Oct. 2, 1902, Nicoll, Anable & Lindsay, attorneys for J. B. McDonald.—U. S. circuit court, southern district of New York, Filed Oct. 4, 1902, John A. Shields, clerk.

110 *Assignment of Errors.*

I. The court erred in holding that it had no jurisdiction to set aside the rapid-transit contract described in the amended bill in equity and to enjoin the execution of the same and to enjoin the issue of bonds to raise money to make payments thereunder because of fraud and mistake in the making of said contract.

II. The court erred in holding that it had no jurisdiction of the whole amended bill in equity.

III. The court erred in holding that the statute of the State of New York described in the bill and designated as the rapid-transit act was void as an impairment of the obligation of a contract and consequently forbidden by the Constitution of the United States.

IV. The court erred in holding that the statute of the State of New York described in the amended bill and therein designated as the rapid-transit act attempted to authorize the deprivation of the complainants' liberty and property without due process of law and was consequently forbidden by the fourteenth amendment of the Constitution of the United States.

V. The court erred in dismissing the amended bill for want of jurisdiction.

VI. The court erred in refusing to grant the relief prayed in the amended bill.

JAMES M. FISK,
Sol'r for C'pl'ts.

(Endorsed:) Circuit court of U. S.—Underground Railroad Company of the City of New York and ano. ag'st The City of New York.—Assignment of errors.—Roger Foster, 35 Wall St. New York.—U. S. circuit court, southern district of New York, Filed Oct. 1, 1902, John A. Shields, clerk.

111 Circuit Court of the United States, Southern District of New York.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and The Rapid Transit Underground Railroad Company, Complainants,

against

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, Individually and as Mayor of the City of New York; Bird S. Coler, Individually and as Comptroller of the City of New York; Alexander S. Orr (Sued as Albert E. Orr), John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (Sued as Charles L. Smith), Morris K. Jessup, Individually and as Members of the Board of Rapid Transit Commissioners of the City of New York; John B. McDonald, and The Rapid Transit Subway Construction Company, Defendants.

Know all men by these presents: That we, the Underground Railroad of the City of New York and the Rapid Transit Underground Railroad Company, as principals, and the Fidelity and Deposit Company of Maryland, having an office and principal place of business for the State of New York, at No. 35 Wall street, in the borough of Manhattan, in the city of New York, as surety, are held and firmly bound unto the above-named defendants, in the full and just sum of two hundred and fifty dollars, to be paid to the said defendants; for which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our corporate seals. Dated the twenty-seventh day of September, one thousand nine hundred and two.

112 Whereas, lately, at a circuit court of the United States, for the southern district of New York, in a suit depending in said court, between The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company, complainants, and The City of New York, Robert A. Van Wyck, individually and as mayor of the city of New York; Bird S. Coler, individually, and as comptroller of the city of New York; Alexander E. Orr, (sued as Albert E. Orr) John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (sued as Charles L. Smith) Morris K. Jessup, individually, and as members of the board of rapid-transit commissioners of the city of New York, John B. McDonald and The Rapid Transit Subway Construction Company, defendants, a decree was rendered against the said The Underground Railroad of the City of New York and the Rapid Transit Underground Railroad Company; and the said The Underground Rail-

road of the City of New York and The Rapid Transit Underground Railroad Company having obtained a writ of appeal, and filed a copy thereof in the clerk's office in said court, to reverse the decree in the aforesaid suit, and a citation directed to the said defendants, citing and admonishing them to be and appear at a session of the Supreme Court of the United States, to be holden at Washington, D. C., on the — day of ——.

Now, the condition of the above obligation is such, that if the said The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company, shall prosecute said writ of appeal, to effect, and answer all damages and costs, if they fail to make the said plea good, then this obligation to be void; otherwise, to remain in full force and virtue.

{Seal Underground Railroad Company of the City of New York, 1896.}

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK,
By OGDEN P. PELL, *Sec'y.*

Attest: JAMES M. FISK, *Sol'r.*

{Seal Rapid Transit Underground Railroad Company of the City of New York, 1897.}

113 THE RAPID TRANSIT UNDERGROUND RAILROAD COMPANY,
By OGDEN P. PELL, *Sec'y.*

Attest: JAMES M. FISK, *Solicitor.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
HENRY B. PLATT, *Vice-President.*

Attest:
[SEAL.] JAMES R. KINGSLEY, *Attorney-in-fact.*

114 STATE OF NEW YORK, } *ss:*
County of New York, }

On this 29th day of September, 1902, before me personally appeared Ogden P. Pell, to me known, who, being by me duly sworn, did depose and say: That he resided at Brooklyn; that he was the secretary of the Underground Railroad of the City of New York, the corporation described in, and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument, was such corporate seal; that it was so affixed by authority of said corporation, and that he signed his name thereto by like order. And the said —— —— further said that he was acquainted with —— ——, and knew him to be the — of said corporation; that the signature of the said —— ——, subscribed to the said instrument, was in the genuine handwriting of the said

—— ——, and was thereto subscribed by like order of the board of directors, and in the presence of him, the said —— ——.

OGDEN PELL.

[SEAL.] ERNEST L. HICKS,
Notary Public, County of New York.

115 STATE OF NEW YORK, } ss:
County of New York, }

On this 29th day of September, 1902, before me personally appeared Ogden P. Pell, to me known, who, being by me duly sworn, did depose and say: That he resided at Brooklyn; that he was the secretary and a director of the Rapid Transit Underground Railroad Company, the corporation described in, and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by authority of the board of directors of said corporation, and that he signed his name thereto by like order. And the said —— —— further said that he was acquainted with —— ——, and knew him to be the — of said corporation; that the signature of the said —— ——, subscribed to the said instrument, was in the genuine handwriting of the said —— ——, and was thereto subscribed by like order of the board of directors, and in the presence of him, the said —— ——.

OGDEN P. PELL,

[SEAL.] ERNEST L. HICKS,
Notary Public, County of New York.

116 STATE OF NEW YORK, } ss:
County of New York, }

On the 27th day of September, in the year 1902, before me personally came Henry B. Platt, to me known, who, being by me duly sworn, did depose and say, that he resided in the city of New York; that he was the vice-president of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3 of chapter 720 of the Session Laws of the State of New York, for the year 1893. And the said Henry B. Platt further said that he was acquainted with James R. Kingsley, and knew him to be the attorney-in-fact of said company; that the signature of the said James R. Kingsley, subscribed to the within instrument, was in the genuine handwriting of the said James R. Kingsley, and was subscribed thereto by like order of the board of directors, and in the presence of him, the said Henry B. Platt.

[SEAL.] ERNEST L. HICKS,
Notary Public, New York County.

At a regular and lawful meeting of the board of directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the company, in the city of Baltimore, State of Maryland, on the 6th day of March, 1901, on motion, it was unanimously

"*Resolved*, That in pursuance of section eight hundred and eleven "of the Code of Civil Procedure of the State of New York, Henry B. "Platt, vice-president, or George Sewell Bonner, attorney, or Frank "H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood "and James R. Kingsley, attorneys-in-fact, of this company, in the "State of New York, be, and each of them is, hereby authorized "and empowered to sign, execute and deliver any and all bonds or "undertakings for or on behalf of this company, and to attach thereto "the seal of the corporation, the same to be attested by the said "George Sewell Bonner, attorney of the company, or by either one "of the other persons above named, as occasion may require."

COUNTY OF NEW YORK, *ss:*

I, James R. Kingsley, attorney-in-fact of the Fidelity and Deposit Company of Maryland, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 27" day of Sept., 1902.

[SEAL.] JAMES R. KINGSLEY,
Attorney-in-fact.

Fidelity and Deposit Company of Maryland.

Statement, December 31st, 1901.

Resources.		Liabilities.	
Real estate	$600,000 00	Capital stock	$2,000,000 00
Stocks and bonds	2,689,208 00	Surplus and undivided profits	2,778,850 66
Railroad bonds	1,932,035 00	Premium reserve	704,698 55
Net premiums due	82,906 99	Claims in process of adjustment	47,145 30
Cash in bank, etc	387,644 06	Claims reported	161,099 54
	$5,691,794 05		$5,691,794 05

STATE OF NEW YORK, }
County of New York, } *ss:*

James R. Kingsley being duly sworn, says that he is the attorney-in-fact of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said company, as of December 31st, 1901, to the best of his knowledge and belief, and that the financial condition of said company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 27" day of Sept., 1902.
ERNEST L. HICKS,
[SEAL.] *Notary Public, New York County.*

117 (Endorsed:) Circuit court of the U. S. southern district of N.Y.—The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company, complainant, against The City of New York, Robert A. Van Wyck, individually, and as mayor of the city of New York, etc. and others, defendants.—Bond.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendants of the right at any time to examine the proper officers of the surety company, under oath, touching its assets, liabilities and financial condition generally. E. Henry Lacombe, U. S. circuit judge.—U. S. circuit court, southern district of New York, Filed Oct. 1, 1902, John A. Shields, clerk.

118 UNITED STATES OF AMERICA, *ss:*

To the City of New York, Robert A. Van Wyck, individually and as mayor of the city of New York; Bird S. Coler, individually and as controller of the city of New York; Alexander E. Orr (sued as Albert E. Orr), John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (sued as Charles L. Smith), Morris K. Jesup, individually and as members of the board of rapid-transit commissioners of the city of New York; John B. McDonald, and the Rapid Transit Subway Construction Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on the 29th day of Oct. 1902, pursuant to an appeal, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company are appellants and The City of New York, Robert A. Van Wyck, individually and as mayor of the city of New York; Bird S. Coler, individually and as controller of the city of New York, Alexander E. Orr (sued as Albert E. Orr) John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (sued as Charles L. Smith), Morris K. Jesup, individually and as members of the board of rapid-transit commissioners of the city of New York, John B. McDonald and The Rapid Transit Subway Construction Company are respondents, to show cause if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 1st day of October, 1902.

E. HENRY LACOMBE,
U. S. Circuit Judge.

119 (Endorsed:) Supreme Court of the United States.—The Underground Railroad of the City of New York, *et al.* appellants, against The City of New York, Robert A. Van Wyck, indi-

vidually and as mayor of the city of New York, *et al.* respondents.—Citation.—A copy of the within has this day been received. Oct. 2, 1902, Nicoll, Anable & Lindsay, attorneys for J. B. McDonald.—Copy received Oct. 2, 1902, Strong & Cadwalader, att'ys for Rapid Transit.—Copy received, Oct. 2, 1902, Boardman, Platt & Soley, per J. T. C.—A copy of the within paper has been this day received at the office of the corporation counsel, Oct. 2, 1902, George L. Rives, corporation counsel.—U. S. circuit court, southern district of New York, Filed Oct. 4, 1902, John A. Shields, clerk.

120 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to one hundred and nineteen inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause entitled The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company, appellants, against The City of New York, Robert A. Van Wyck, individually and as mayor of the city of New York, Bird S. Coler, individually and as controller of the city of New York, Alexander E. Orr, (sued as Albert E. Orr) John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (sued as Charles L. Smith), Morris K. Jesup, individaally and as members of the board of rapid-transit commissioners of the city of New York, John B. McDonald and The Rapid Transit Subway Construction Company are appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 24th day of October in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-seventh.

[Seal of the Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States Supreme Court. The Underground Railroad of the City of New York *et al.*, appellants, *vs.* The City of New York *et al.*, appellees. Transcript of record from the circuit court of the United States, for the southern district of New York.

Endorsed on cover: File No. 18,717. S. New York C. C. U. S. Term No. 489. The Underground Railroad of the City of New York and The Rapid Transit Underground Railroad Company, appellants, *vs.* The City of New York, Robert A. Van Wyck, individually and as mayor of the city of New York; Bird S. Coler, *et al.* Filed October 28th, 1902.